DOCUMENT RESUME

ED 253 929 EA 017 503

AUTHOR Clear, Delbert K.
TITLE Bargaining.
PUB DATE 84
NOTE 61p.; Chapter 3 of: The Yearbook of School Law, 1984 (EA 017 500).
PUB TYPE Books (010) -- Information Analyses (070) -- Legal/Legislative/Regulatory Materials (090)

EDRS PRICE MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS Arbitration; *Collective Bargaining; Conflict Resolution; Constitutional Law; *Court Litigation; Elementary Secondary Education; Grievance Procedures; Labor Relations; Negotiation Agreements; Negotiation Impasses; *School Law; Scope of Bargaining; Strikes; Unions
IDENTIFIERS Fair Share Agreements

ABSTRACT

In this report on decisions made by federal and state courts during 1983 concerning collective bargaining in public elementary and secondary education, it is noted that the number of cases rose substantially from 1982. The standards according to which these cases are determined are relatively well developed and stable, but are resistant to prospective application in individual disputes. The result is that the decisions offer few guidelines to those involved in other employer-employee disputes. The topics covered in the chapter include constitutional issues related to access to employer mailing systems, the enforcement of fair share agreements, and the protection of union members from reprisal. Other topics addressed are the authority to bargain, recognition of bargaining units, the rights and obligations of bargaining representatives, the scope of bargaining, grievability and arbitrability of disputed matters, managerial prerogatives, judicial review of administrative proceedings, impasse and dispute resolution, strikes and job actions, and a number of miscellaneous issues. (PGD)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED253929

U.S. DEPARTMENT OF EDUCATION
NATIONAL INSTITUTE OF EDUCATION
EDUCATIONAL RESOURCES INFORMATION
CENTER (ERIC)

☑ This document has been reproduced as received from the person or organization originating it.

☐ Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official NIE position or policy.

PERMISSION TO REPRODUCE THIS MATERIAL IN MICROFICHE ONLY HAS BEEN GRANTED BY

T. Jones

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

3

BARGAINING

Delbert K. Clear

Introduction 3.0
Constitutional Issues 3.1
Authority to Bargain 3.2
Recognition of Unions and Representation Problems 3.3
- Unit Determination 3.3a
  - Supervisory, Managerial, and Confidential Employees 3.3a(1)
  - Other Issues Regarding Recognition and Representation 3.3a(2)
- Elections 3.3b

Rights and Obligations of Exclusive Bargaining Representatives 3.4
- Union Rights 3.4a
- Union Security 3.4b
- Obligations of the Exclusive Representative 3.4c

Scope of Bargaining 3.5
- Duty to Bargain 3.5a
- Interrelationship with Other Laws 3.5b
- Proposals Within Mandatory Scope of Bargaining 3.5c
- Proposals Within Permissive Scope of Bargaining 3.5d
- Proposals Within Prohibited Scope of Bargaining 3.5e
- Terms of Collective Bargaining Agreements 3.5f

Grievability and Arbitrability 3.6
- Presumption of Arbitrability 3.6a
- Who Determines? 3.6b
- Remedy as a Factor in Arbitrability 3.6c
- Procedural Issues 3.6d
- Management Prerogatives as a Bar 3.6e
- Tenure Issues 3.6f
- General 3.6g

Judicial Review of Awards 3.7
- Standard of Review 3.7a
- Propriety of Awards 3.7b

Impasse and Dispute Resolution 3.8
- Factfinding and Arbitration 3.8a
- Rights on Expiration of Contract 3.8b

EA 017 503

Concerted Activity 3.9
Strikes 3.9a
Enforcement Actions 3.9b
Miscellaneous Decisions 3.10
Conclusion 3.11

3.0 INTRODUCTION

Last year's chapter began and ended with the observation that opportunities for litigation in collective bargaining in education seem endless. This year's review has uncovered no reason to modify that observation. Whereas in 1982 over 160 cases were reported, over 190 were published during 1983. The sheer magnitude of the cases suggests that in the dynamic world of collective bargaining and contract administration many polarized, mutually exclusive interests abound and the only way many parties are willing to settle them is via the adversarial "winner take all" promised land of litigation (never mind that the "winners" seldom "take all," given the economic, emotional, and human costs of litigation). Consequently, those who seek only well-settled and stable prospective answers to their particular employer-employee disputes need read no further. No such answers can be derived from collective bargaining litigation that occurred during 1983 (or any other year, for that matter).

Even the most uniformly applied standards, such as the well-established "essence" test to determine the propriety of arbitrators' awards vis-a-vis collective bargaining agreements, are so resistant to prospective application in individual disputes that there is no hope that one day all the possible issues will have been raised and resolved. As a result, litigation continues, not so much to develop and/or identify the standards on which collective bargaining and contract administration will function, but more to resolve individual disputes on a case-by-case basis according to the relatively well-developed standards that have been and continue to be articulated by courts without substantial change.

3.1 CONSTITUTIONAL ISSUES

Three classes of issues generated the majority of constitutionally based decisions: (1) whether granting recognized bargaining agents exclusive access to employer mailing systems constitutes a violation of competing

organizations' protected rights; (2) whether "fair share" agreements constitute a violation of nonmembers' protected rights; and (3) whether dismissal or other employer discipline of union members constitutes reprisal for protected activity.

Though the United States Supreme Court established early in 1983 that "providing exclusive access [to school mail facilities] to recognized bargaining representatives is a permissible labor practice in the public sector,"[1] disputes continue to arise regarding the extent to which local practices fit into the generalization. In Texas a collective bargaining agreement provided for the superintendent to review and approve all such mailings. The Court of Appeals for the Fifth Circuit unconvinced that sufficiently compelling state interest existed to justify the practice, hence found it chilling under the first amendment.[2] An unexpected permutation of the principle occurred in Michigan where the court ruled that when an incumbent union officer's candidacy for office is announced, the union may not grant that person exclusive use of its newsletters. Even in administration of its own mailing systems, the union was prevented by the Labor-Management Reporting and Disclosure Act from discriminating against nonendorsed candidates and was ordered to mail a flyer of the opposing slate of officers at union expense. The court of appeals did not share the district court's fear that granting plaintiff's request would constitute excessive entanglement with the union's first amendment rights.[3]

By far the most litigation arose out of various efforts to implement fair share agreements. Here, the 1977 Supreme Court decision in *Abood*[4] that such agreements, per se, do not constitute a violation of nonmembers' rights is applied on a case-by-case, state-by-state basis. Perhaps the most interesting application occurred in the state of Washington where a vacated and remanded decision from the United States Supreme Court was reheard. This time, only state law and constitutional provisions were applied as the standards to examine an employee's request for exemption from an otherwise valid fair share agreement on the basis of his religious convictions. His personal religious tenets against contributing to any secular organizations were found sufficiently compelling to warrant protection. It is noteworthy, however, that he did not ask to retain the saved dollars for his personal use. He had, all along, proposed to donate them to a charitable organization that did not fall under the proscription of his beliefs.[5]

---

1. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 103 S. Ct. 948, 958 (1983).
2. Yselta Fed'n of Teachers v. Yselta Indep. School Dist., 720 F.2d 1429 (5th Cir. 1983).
3. Bliss v. Holmes, 721 F.2d 156 (6th Cir. 1983).
4. Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).
5. Grant v. Spellman, 99 Wash.2d 815 (1983).

In Maine, a rival organization that had been established partially out of opposition to a fair share agreement was found to have first amendment protection in expressing its opposition to the certified bargaining unit even where a flyer it sent out contained "false and misleading information designed to confuse unit members."[6] The court concluded that the action "only tended" to interfere with the certified union's security. Since no actual interference or intentional or knowing misrepresentation had occurred, the dissident group's first amendment rights prevailed over the established organization's claims of unfair labor practice.

Determining the amount that is "fair" under the *Abood* doctrine generates much litigation. Practices range from deducting, on the one hand, some rationally determined percentage of members' dues that is devoted to "costs of bargaining and contract administration" (as opposed to political activity) to the unions' baldly certifying, on the other, that the costs of representation are equivalent to the members' dues. Court decisions tracked an equally broad range. A federal district court in New Jersey enjoined (pending changes in legislation) collection of full dues first, then providing for refund through challenges of one sort or another because it found the refund procedures "so onerous that they are unusable."[7] In both California and Michigan, by contrast, courts found that not only was a pay first, obtain refund later practice constitutionally permissible, but also that employment relations board's appeals regarding it must be exhausted prior to litigation. This arises, according to the rulings, because the constitutional defects, if any, would be nominal, making the practice no more than arguable as an unfair labor practice.[8]

Direct challenge to the constitutionality of fair share fees as improperly delegating power to employment relations boards was turned aside in Minnesota when a court found that the state's interest in orderly and "enlightened" labor relations was greater than any individual community college faculty member's right of free association (including *not* to associate). The only constitutional flaw it found in the legislation was its granting association members sole participation in selecting "meet and confer" representatives. This decision was particularly significant in that the court found fair share fee agreements justified, despite being convinced that "[v]ital concern for academic freedom warrants a heightened standard of scrutiny when, as here, the

---

6. Association of Indep. Professionals v. Maine Labor Rels. Bd., 465 A.2d 401, 412 (Me. 1983).

7. Robinson v. New Jersey, 547 F. Supp. 1297, 1323 (D.N.J. 1982).

8. Link v. Antioch Unified School Dist., 191 Cal. Rptr. 264 (Cal. Ct. App. 1983); Board of Educ. of Detroit v. Parks, 3[illegible] N.W.2d 641 (Mich. 1983).

state regulates the forum for academic speech."[9] The court's response to the claim that the various local and national political action committees of the labor organization constituted improper and unconstitutional use of fair share fees was that such activities, even where clearly partisan, were based sufficiently on voluntary participation independent of dues to thwart the argument. Other political activities, the court found, were wholly proper because each of the challenged practices was "predominately engaged in activities closely and directly related to collective bargaining."[10]

A similar conclusion was reached in Hawaii, where "conscious, knowing, and deliberate intent" to direct funds to partisan and political activity was the standard required to invalidate the constitutionality of agency fees, even though the union expenditures under challenge had been found by the PERB to have been impermissible.[11]

Still unclear among the various jurisdictions is the standard by which proportional fees will be examined in determining their constitutionality. The United States Supreme Court's skirting of the matter in *Abood* has left the determination up to lower courts, which has resulted, inevitably, in variability among jurisdictions. In New York, a court found that such fees, though exactly equal to members' dues, were not unconstitutional, per se, where a rebate procedure was in effect. In the case at hand, it could find no evidence that unauthorized use was being made of plaintiffs' money, leading the court to conclude that absent clear and convincing evidence of such, a presumption must be made that the fees were being used permissibly. In sum, the burden of proof, through showing of evidence, is placed squarely on the plaintiffs; no abstract claims will be honored.[12] However, no impediments may be placed in the way of dissident employees who wish to engage in discovery investigation regarding the use of the fees. According to a federal district court in Michigan,

> First Amendment principles establish that the loss of freedom of speech, assembly, or association, for even minimal periods of time, constitute irreparable injury. Additionally, the fact the plaintiff's monetary damages may be minimal in no way makes the inquiry in the instant dispute less complicated or important.[13]

---

9. Knight v. Minnesota Commun. College Faculty Ass'n, 571 F. Supp. 1, 9 (D. Minn. 1982).
10. *Id.* at 7.
11. Aio v. Hamada, 664 P.2d 727 (Hawaii 1983).
12. Haag v. Hogue, 456 N.Y.S.2d 978 (Sup. Ct. 1982).
13. Lehnert v. Ferris Faculty Ass'n, M.E.A.-N.E.A., 556 F. Supp. 316 (D. Mich. 1983).

In Indiana, a fair share fee only slightly smaller (about $8.00 less) than association dues was found constitutionally valid even though expressed statutory permission to engage in agency shop agreements is absent. Paying it did not, contrary to plaintiffs' arguments, constitute involuntary membership.[14] Similar conclusions were reached by courts in Michigan and Illinois, even to finding that agreements providing for discharge of tenured teachers for failure to pay the fees do not transgress property or other interests.[15]

Curious applications of fair share provisions sometimes occur. In Ohio, a university's refusal to withhold dues of members of unrecognized unions was found to be rationally related to the university's legitimate interest in controlling administrative costs and preserving labor peace. The court was not convinced that the unrecognized units suffered unconstitutional deprivation of equal protection of the law.[16] In Virginia, legislative provisions for dues checkoff for teachers were found not to require extending the practice to police employees through equal protection guarantees.[17]

Teachers in several states found themselves in situations where it appeared to them that they were being disciplined for engaging in protected organizational activity. Most often the issue was dismissal, but changes in assignment also triggered the claims. The conclusions in all were consistent: where the teacher was able to show plausible evidence that the board's action was motivated by displeasure with filing grievances, making critical speeches, or any other associational activity, the court reinstated.[18]

Not all such claims prevailed, however. The board's reassignment of a teacher from teaching psychology to English was upheld in Kentucky. The decision to change the assignment, the record revealed, had been made prior to an association-related controversy that had occured. Similarly, failure to rehire teachers in Mississippi was found not to have been motivated by their union activities.[19] The United States Supreme Court's decision in *Connick v. Meyers*, upholding an employee's dismissal for associational activity, clearly limits, however, the protection currently available. According to the Court,

---

14. Fort Wayne Educ. Ass'n v. Goetz, 443 N.E.2d 364 (Ind. Ct. App. 1982).

15. Parks, *supra* note 8; Hudson v. Chicago Teachers' Union, Local No. 1, 573 F. Supp. 1505 (N.D. Ill. 1983).

16. Ohio Civil Serv. Employees' Ass'n v. University of Cincinnati, 444 N.E.2d 1353 (Ohio Ct. App. 1982).

17. Decker v. Hampton (E.D. Va., No. 82-109-NN) ¶37,745, *1981-1983 Public Bargaining Cases* (Chicago: Commerce Clearing House, 1984), at 39,444.

18. Napoleon Educ. Ass'n v. Napoleon Commun. Schools, 336 N.W.2d 481 (Mich. Ct. App. 1983); Thomas v. Farmer, 573 F. Supp. 128 (D. Ohio 1983).

19. Reichert v. Draud, 701 F.2d 1163 (6th Cir. 1983); Jackson v. Hazelhurst Mun. Sep. School Dist., 427 So. 2d 134 (Miss. 1983); Tanner v. Hazelhurst Mun. Sep. School Dist., 427 So. 2d 977 (Miss. 1983).

> [w]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.[20]

Among the miscellaneous and sometimes more creative constitutional claims filed were efforts to utilize the first and fourteenth amendments to *establish* vested interest, rather than to vindicate already recognized rights. In Ohio, where faculty members sought to require the university to enter into a collective barbaining agreement, a court ruled flatly that it could not mandate collective bargaining through either equity or law-based rationale.

> While fundamental First Amendment rights of freedom of speech, association and assembly are admittedly applicable to public employees, thus preserving their right to organize and select a bargaining representative, such latter right continues to exist and is not impaired or negated by a refusal of a public body to grant collective bargaining. No fundamental right is infringed by such refusal.[21]

Nontenured employees in Illinois and Tennessee were equally unsuccessful. They failed to convince courts that describing evaluation procedures in the collective bargaining agreement and establishing grievance procedures in policy manuals created sufficient expectation of reemployment to invest their positions with a property interest. Full due process hearings prior to nonrenewal of probationary contracts were not, therefore, required. The Tennessee court was particularly blunt in rejecting the claim: "No process is due plaintiffs but that which the state voluntarily gives them."[22]

The following were held insufficient, in and of themselves, to invest first and fourteenth amendments protection sufficient to create a federal cause for action: (1) a teacher's reference to the "welfare of the students" at a termination hearing; (2) reducing annual contract salary amounts commensurate with time lost due to an illegal strike; and (3) refusing a "step up" the salary schedule after the expiration of an agreement

---

20. Connick v. Meyers, 103 S. Ct. 1684, 1690 (1983).
21. Ohio Univ. Faculty Ass'n v. Ohio Univ., 449 N.E.2d 792, 795 (Ohio Ct. App. 1982).
22. Board of Trustess, Commun. School Dist. No. 513 v. Krizek, 446 N.E.2d 941 (Ill. App. Ct. 1983); Robertson v. McElrath, 661 S.W.2d 88, 91 (Tenn. Ct. App. 1983).

and during impasse.[23] None of the rulings, however, foreclosed the possibility of recovery under state proceedings.

First amendment issues were raised in two disputes over extending labor relations legislation into church-operated schools. In New York, the state Labor Relations Board's assertion of jurisdiction in unfair labor practice claims by lay employees of the Archdiocese of New York City was found to result in excessive entanglement. By contrast, in West Virginia a court found that extending the minimum wage and equal pay provisions of the federal Fair Labor Standards Act to church-operated schools would not constitute free exercise or establishment violations. A distinction was made, however, between lay employees and those who were members of the "religious order."[24]

In a claim that the school board's rehearing of a dispute on remand was defective due to bias because it included three members who had originally heard the matter, a court looked in vain for such evidence: "[plaintiff] gives us no reason to doubt the statements of the Board members other than his own belief that it could never impartially decide his case. We reject that unfounded belief and conclude that his due process rights were not violated." A strongly worded dissent disagreed, however, finding that "[plaintiff's] constitutional, statutory, and contractual rights were trampled upon by the board."[25]

3.2 AUTHORITY TO BARGAIN

Although authority to bargain is well established in most jurisdictions, there is little doubt that a public employer may not do so without expressed statutory authorization. Such authority, moreover, must come directly; it cannot be imputed via a state's general industrial relations statutes.[26] In Alabama, a county board of education's method of reducing its teaching staff, inter alia, was developed and implemented after "meet and confer" discussions with the employees' association pursuant to state law. Subsequently the board attempted to abrogate the reduction in force procedures, claiming that it was required to follow the statutes, which were somewhat different, and took the

---

23. Renfroe v. Kirkpatrick, 722 F.2d 714 (11th Cir. 1983); Ash v. Board of Educ., Woodhaven School Dist., 699 F.2d 822 (6th Cir. 1983); New Castle Cty. Voc.-Tech. Educ. Ass'n v. Board of Educ., New Castle Cty. Voc.-Tech. School Dist., 569 F. Supp. 1482 (D. Del. 1983).

24. Catholic High School Ass'n, Archdiocese of New York v. Culvert, 573 F. Supp. 1550 (D.N.Y. 1983); Donovan v. Shenandoah Baptist Church, 573 F. Supp. 320 (D. W. Va. 1983).

25. Olds v. Board of Educ., Nashua Commun. School Dist., 344 N.W.2d 765, 769, 774 (Iowa Ct. App. 1983).

26. Lincoln Educ. Ass'n v. School Dist. City of Lincoln, 336 N.W.2d 587 (Neb. 1983).

position that its original adoption of the policy was illegal, having been the product of bargaining that was expressly foreclosed by the statutes. The court did not agree, finding that despite the discussions, which were both authorized and mandated, the board had unilaterally adopted the policies. Once adopted, said the court, the board was bound by them until such time as they were changed. Absence of expressed authority to bargain, per se, did not prevent it from entering into voluntary agreements that would be binding until changed—even to submission of disputes over their interpretation to advisory (but not binding) arbitration.[27]

In Florida, the court recalled its own 1982 decision in which it had extended to the board of regents the authority to bargain with a number of employee units. To clarify that graduate assistants of various types in the university system were among them, the court vacated the PERC's refusal to certify one such unit and revised its 1982 decision specifically to include them.[28]

In Hawaii, the board of regents of the university was found to have statutory and constitutional authority to agree to submit disputes regarding tenure and promotion to binding arbitration and to empower the arbitrator to reverse official decisions found to be arbitrary or capricious.[29] A court in Maine, in approving an arbitrator's reinstatement of a dismissed teacher, reminded litigants that absent specific statutory authority (which the court had found) boards would lack the authority to subject dismissals to review by arbitrators.[30]

A clear-cut issue regarding authority to bargain arose under federal jurisdiction when principals and assistant principals of schools on military bases in the Caribbean sought to bargain an agreement with the Department of the Navy. The court declined to accept plaintiffs' argument that the authority to do so could be found in a statute that requires the schools in the region to be maintained on a par with those in the District of Columbia.

> There is nothing either in the language of the statute or in the legislative record examined to support plaintiffs' position. Furthermore, to derive rights of collective bargaining from the silence of the record would not only require an unwarranted exercise of judicial interference with the statute, but may also

27. Walker Cty. Bd. of Educ. v. Walker Cty. Educ. Ass'n, 431 So. 2d 948 (Ala. 1983).
28. United Faculty, Local 1847 v. Board of Regents, State Univ. Sys., 423 So. 2d 429 (Fla. Dist. Ct. App. 1982).
29. University of Hawaii Professional Assembly, Daeufer v. University of Hawaii, 659 P.2d 720 (Hawaii 1983).
30. Cape Elizabeth School Bd. v. Cape Elizabeth Teachers' Ass'n, 459 A.2d 166 (Me. 1983).

> lead to dangerous results that may affect the principal purpose of this legislation in guaranteeing quality education to the children of certain military servicemen and federal employees.[31]

The court did, however, order an investigation into the plaintiffs' claim that they were not receiving equal treatment with their counterparts in the District of Columbia as required by federal law.

3.3 RECOGNITION OF UNIONS AND REPRESENTATION PROBLEMS

3.3a Unit Determination

3.3a(1) Supervisory, Mangerial, and Confidential Employees

Whether it is appropriate, in the abstract, for supervisory employees to organize and collectively bargain has been little discussed. There was, in fact, no litigation reported during 1983 that was rooted solely in that issue. In Wisconsin, efforts continue to pass legislation granting such rights to them. Though the law is sponsored primarily by the Administrators' and Supervisors' Council of the Milwaukee Public Schools (an organization that informally bargains with the board for its members' interests—it even has a full-time executive secretary), the current version has been amended to apply statewide. Similar legislation has failed in previous sessions of the legislature. Without question, middle-level administrators, as public employees, lack authority to organize and bargain, absent specific legislative permission to do so. Whether there might be some constitutional defect in legislation permitting it remains to be seen, although the number of such organizations that currently exist suggests that this argument will be a difficult one to sustain.

3.3a(2) Other Issues Regarding Recognition and Representation

Recognition and the right to represent do not extend to every group that perceives itself to have common interests. Coaches in a Michigan district, for example, were found not to be certifiable as an independent unit. Well-established principles not favoring fractionalization were cited by the court, along with comments regarding the overriding community of interest the coaches had with other teachers during most of their teaching day.[32] In New York, certain continuing education

---

31. Antilles Council of School Officers, Local 68, Am. Fed'n of School Adm'rs, AFL-CIO v. Lehman, 550 F. Supp. 1238, 1244 (D.P.R. 1982).

32. Michigan Coaches' Ass'n, Warren Consol. School Dist. Local No. 1 v. Warren Consol. Schools' Bd. of Educ., 321 N.W.2d 432 (Mich. Ct. App. 1982).

instructors were found to lack public employee status as defined in the law and, hence, were denied the right to organize and engage in bargaining.[33] An arbitrator in Illinois exceeded his authority by hearing a grievance brought on behalf of substitute teachers. The court found that the substitute teachers, in not being members of the association, could not have their dispute with the board carried forward by the bargaining unit.[34] The special insight that arbitrators have in labor matters was recognized by a court in Florida, which ruled that the PERC could not reject an arbitrator's finding that an employee as a member of a particular unit, and, hence, could file a grievance under the collective bargaining agreement. Similar decisions occurred in Massachusetts and Pennsylvania.[35]

3.3b Elections

Elections were a source of a fair amount of litigation during 1983. A Pennsylvania trial court had reversed a PERB certification of a unit and ordered a new election because of irregularities in voter eligibility. The appellate court reversed, finding that since no challenge to some of the voters' eligibility had been included in the initial unfair labor practice complaint that had eventuated in the litigation, the trial court had improperly considered the matter. The parties' original, though tacit, agreement on the original list of certified members bound them to it, and the matter could not be raised at a later date.[36]

In Nebraska, where the Teachers' Professional Negotiations Act (TPNA) does not require boards either to recognize or to bargain with a teachers' association, a unit sought certification under the state's Commission of Industrial Relations Act. The Commissioner of Industrial Relations (CIR) ordered an election, which was held, with the plaintiff association receiving a clear majority of the votes. Nevertheless the board refused to bargain with the unit, claiming that the Commission of Industrial Relations had no jurisdiction. The court found the provisions of the state's Teachers' Professional Negotiations Act to be clearly exhaustive of procedures due the teachers and reversed the commission's assertion of jurisdiction. With a hint of impatience, it commented that

---

33. Boces III Faculty Ass'n, N.Y.S.U.T., AFT, AFL-CIO v. Public Employment Rels. Bd., 460 N.Y.S.2d 362 (N.Y. App. Div. 1983).

34. Board of Educ., Meridian Commun. Unit School Dist. No. 101 v. Meridian Educ. Ass'n, 445 N.E.2d 864 (Ill. App. Ct. 1983).

35. Leapley v. Board of Regents, Florida State Univ. Sys., 423 So. 2d 431 (Fla. Dist. Ct. App. 1983); Commissioner of Admin. v. Local 509, Serv. Employees' Int'l Union, AFL-CIO, 447 N.E.2d 683 (Mass. App. Ct. 1983); Northwest Tri-Cty. Intermediate Unit No. 5 Educ. Ass'n v. Northwest Tri-Cty. Intermediate Unit No. 5, 465 A.2d 85 (Pa. Commw. Ct. 1983).

36. Bucks Cty. Schools, Intermediate Unit No. 22 v. Pennsylvania Labor Rels. Bd., 446 A.2d 262 (Pa. Commw. Ct. 1983).

> [h]owever imaginatively the proposition is stated, whether in terms of relative bargaining power of the parties or in terms of the limitation on the power of the districts as compared to the CIR, the effect of the method proposed by the appellee association is to render useless the TPNA. No authority is cited as to how or by what rationale we are to ignore the plain words of [the statute], nor how we may ignore the requirements of the TPNA. The actions of the CIR were clearly without jurisdictional basis and the decisions are reversed.[37]

In Massachusetts, a supervisor in a university's transportation department had engaged in prounion activity during a certification election campaign. The university attempted to have the vote in favor of affiliation set aside because of this arguably improper interference. The court found that the unclear employment status of the employee prior to the election made the impropriety of his influence open to question. Further, it observed, "[w]e recognize the well-established rule that an employer who 'stand[s] idly by after learning that one of its supervisors has engaged in pro-union or anti-union conduct' may be precluded from raising that supervisor's conduct as an objection to the union election."[38]

The Ohio Supreme Court found that the existence of an unexpired agreement was no bar to an order mandating a new election. A majority of the unit's members had signed petitions requesting a new election; it had been more than five years since the most recent one; and the current contract was in the final one-quarter of a three-year duration. The absence of controlling statutes made it possible for the court to base its decision on equitable principles.[39] A court in Pennsylvania found similarly, basing much of its decision upholding a PERB ruling on NLRB precedent. In this case, the board was required to open negotiations even though the new unit had been certified within two months after both the board and the former unit had signed and ratified a two-year agreement.[40]

3.4 RIGHTS AND OBLIGATIONS OF EXCLUSIVE BARGAINING REPRESENTATIVES

3.4a Union Rights

Once certified, the bargaining unit has the right to represent its members' interests with as much vigor as it chooses. However, as

---

37. Lincoln, *supra* note 26, at 590.
38. NLRB v. Northeastern Univ., 707 F.2d 15, 19 (1st Cir. 1983).
39. Association of Cuyahoga Cty. Teachers of Trainable Retarded v. Cuyahoga Cty. Bd. of Mental Retardation, 451 N.E.2d 1215 (ohio 1983).
40. Richland School Dist. v. Pennsylvania Labor Rels. Bd., 454 A.2d 649 (Pa. Commw. Ct. 1983).

discussed in sections 3.1 and 3.2, such rights must be explicitly derived from statutory or constitutional provisions. For instance, provisions for dues check-off for teachers' unions did not, by extrapolation, extend to police units in the same municipality.[41] Union rights are more often tested when individuals doing the representing come under some sort of organizational changes such as reduction in force, nonrenewal, discharge, transfer, or changes in wages (in short, any of their working conditions). When this occurs, the possibility arises that the district has engaged in retaliation for union activity, clearly a violation of the employee's right to represent. On the other hand, if the change in working conditions would have occurred absent the activity, no such right is implicated.[42]

Though these parameters of the law are known to all, many cases occurred during 1983 that tried the facts of particular situations to determine where the disputes fell within them. Active union members were both protected and unprotected in states where there is no tenure, as well as where it is a long-established practice. In Mississippi, for instance, teachers do not have tenure; they have, by law, only an opportunity "to present matters in extenuation or exculpation to enable the board to determine whether the recommendation of nonemployment is a proper decision and not contrary to law, *and not to establish a system of tenure or require that all decisions of nonreemployment be based on cause.*"[43] Here, the teacher was unable to provide fact testimony to support a claim that his membership in the union was the principal motivation in the board's decision to nonrenew his appointment and the court found that "[t]he burden was upon the appellant to prove that the predominant reason for non-renewal of his contract was due to membership in, or connection with, the labor union, and he wholly failed to meet that burden."[44]

Similarly in Michigan, even though tenure is strongly established there, discharged employees were unsuccessful in showing that their dismissals were due to their union activity. The court discussed at length the burden of proof standard:

> In *Wright Line* [102 S. Ct. 1612], the Court held that where it is alleged that a discharge is motivated by anti-union animus the burden is on the party making the claim to demonstrate that protected conduct was a motivating factor in the decision of the employer to discharge the employee. Once this showing is established, the burden then shifts to the employer to

41. Decker, *supra* note 17.
42. Mount Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).
43. Jackson, *supra* note 19, at 136.
44. *Id.* at 137.

> demonstrate that the same action would have taken place even in the absence of the protected conduct. The burden of the employer is one of going forward to meet the prima facie case established by the employee. It is not a burden of persuasion on the ultimate issue of the existence or non-existence of a violation. It is a balancing of the evidence. If the employer, by credible evidence, balances the employee's prima facie case, the employer's burden of proof is met and the duty of producing further evidence shifts back to the employee. The burden of the employer referred to is a burden of production of evidence to meet the prima facie case of the employee. If the burden of the employer is met, the burden is then once again on the employee. As the court in *Wright Line* pointed out, however, burdens of "persuasion" and "production" are not, as a practical matter, likely to be very important in most cases as decisions will usually turn on a weighing of the evidence.[45]

Particularly convincing to the court was the fact that work-related unsatisfactory ratings and disciplinary steps had been taken with the employee prior to his having engaged in union activity.

Other such disputes in Michigan, Massachusetts, and Vermont resulted in different outcomes. Here, the burden of proof shifted clearly to the employers, and their responses were found insufficient to relieve themselves of claims of improper retaliation for protected associational activity. The Michigan court was explicit in its finding that, absent compelling facts to the contrary, the MERC's finding of improper motivation should be upheld.

> Although we might have reached a different conclusion sitting as trier of fact, the commission's factual conclusions were supported by competent, material, and substantial evidence.... Reasonable minds could easily differ on the weight to be given the various reasons.... MERC has presented a sound theory based on reasonable inferences and records evidence supporting its conclusion. The great weight of the evidence does not rest with either side. We therefore, defer to MERC's judgement.[46]

The right of an employees' organization to be creative in pursuit of its members' interests was vindicated by a New York court that approved an agreement wherein it was intended that the employees' association would eventually subcontract with the board for transportation

---

45. Michigan Educ. Support Personnel Ass'n v. Evart Pub. Schools, 336 N.W.2d 235, 237 (Mich. Ct. App. 1983).

46. Napoleon, *supra* note 18, at 484; School Comm. of East Brookfield v. Labor Rels. Comm'n, 449 N.E.2d 672 (Mass. App. Ct. 1983); Kelly v. Day Care Center, Inc., 451 A.2d 1179 (Vt. 1983).

services rather than have its members remain district employees. The state Civil Service Employees' Association had alleged that the PERB's approval of the union's petition to withdraw from state affiliation was improper due to its intention not to remain a traditional labor organization.[47]

Teachers' associations in New Jersey and Rhode Island were successful in asserting the general right to record electronically, including video-taping, school board meetings under certain conditions and without school board consent. The New Jersey court established detailed guidelines and requirements, all of which were designed to minimize distractions. Closed sessions, as defined in the law, were excluded.[48]

3.4b Union Security

Maintenance of organizational health is a perennial concern in any organization; not only are unions and other employee bargaining units not immune from the task, but also they must give it extraordinary attention because they are voluntary associations devoted solely to obtaining benefits for their members that will outweigh the costs of belonging. This represents a more volatile security base than that of school boards who can depend on being needed and receiving continued funding regardless of what they do (within reason). Consequently, employee units take various steps to enhance organizational security even though, on their face, the practices may arguably violate certain individuals' personal preferences. The courts' responses to employee complaints about the practices is to defer to the organizations' collective needs, most often citing the state's legitimate interest in fostering labor peace as justifying a board's agreeing to such provisions. Courts seldom examine whether the methods selected actually do result in labor peace. Rather they take the stance that if the matter is considered important by the labor organization, and if it would not be a gross violation of constitutional or statutory law, then sufficient justification for granting it exists.

The most frequently litigated security provisions are (1) fair share or agency shop agreements wherein nonmember employees are required to contribute funds to the union treasury; (2) granting the recognized unit exclusive access to inhouse mailing systems; and (3) statutory and contractual prohibition against the district's bargaining with nonrecognized units or individuals. (Litigation regarding the first two

47. Civil Serv. Employees' Ass'n v. Newman, 457 N.Y.S.2d 820 (N.Y. App. Div. 1982).
48. Belcher v. Mansi, 569 F. Supp. 379 (D.R.I. 1983); Maurice River Twp. Bd. of Educ. v. Maurice River Twp. Teachers' Ass'n, 455 A.2d 563 (N.J. Super. Ct. 1983).

of these is invariably couched in constitutional terms; it has been reviewed in section 3.1.) A nonconstitutional claim regarding fairshare fees was raised in Michigan, however, and the court ruled that dismissal of a tenured teacher for refusal to pay the fees was justified, inasmuch as the state's PERA specifically stated that fairshare legislation was not to be limited by any other legislation. The court was especially persuaded by the consistent findings in federal jurisdictions that discharge is a permissible remedy for the breach of this contractual condition of employment.[49]

Other employer practices from time to time implicate union security, though not every conceivable obstacle for an employee association is found to be impermissible. In Ohio, a university's practice of refusing to withhold dues for unrecognized units was found to be rationally related to the public interest in maintaining labor peace (with certified unions) and controlling the costs of administration.[50] A Tennessee law establishing that only when a union's membership achieved 20 percent or more of all employees would dues checkoff benefits be extended was found not unduly restrictive to minority units.[51]

Perhaps the most potentially far-reaching harbinger of union insecurity was announced in Illinois, where collective bargaining is just beginning to occur in education throughout the state under newly adopted legislation. Here, it was found that nothing in the statute required boards to grant any organization exclusive status and that, absent such a provision in a local agreement, a board can bargain with individual teachers. The statute, however, was found to prevent a board from bargaining with any organization other than a certified one.[52]

3.4c Obligations of the Exclusive Representative

A direct line of logic runs from the authority contained in legislative provisions for employees to organize voluntarily for purposes of collective bargaining to the expectation that any such organization so constituted has an obligation to represent the interests of its constituency. Though this logic seems sufficiently compelling to defy gainsaying, it is easy to overlook the fact that bargaining legislation not only establishes the opportunity to bargain but also creates a common-law responsibility on the part of the employee organization to pursue the interests of all of its members, including the *obligation* to grieve all contract violations.

---

49. Parks, *supra* note 8, *passim*.
50. Ohio Civil Serv., *supra* note 16.
51. Brown v. Alexander, 718 F.2d 1417 (6th Cir. 1983).
52. Minooka High School Educ. Ass'n v. Board of Educ., Minooka Commun. High School Dist. No. 111, 457 N.E.2d 162 (Ill. App. Ct. 1983).

In Massachusetts and Montana, unions were alleged to have failed in this obligation and, by not having grieved the matters, to have voluntarily waived the right to do so. In both instances, the courts adopted a very narrow stance in rejecting the districts' claims, but the rationale in both decisions clearly preserved the possibility of such a waiver arising out of conscious, deliberate, and explicit union action or inaction. In the Massachusetts case the court found that such a waiver did not derive from "boiler-plate, zipper clause" language reserving all rights not contained in the agreement to the employer. According to the court, waiver can arise only when one party can

> show that the other party clearly and unmistakably waived its right to bargain over an unlawful unilateral change where the other party had actual notice of the proposed change, a reasonable opportunity to negotiate over it, and unreasonably or inexplicably failed to bargain or to request bargaining.[53]

In Montana, a union had long neglected to grieve the district's practice of not paying for unused sick leave upon teachers' retirements. In the case at hand, the union sought an order to begin compliance with the terms of the agreement and five years' retroactive payments. Noting that the provision had never been followed, the trial court found that

> [t]he long acquiescence of the [Union] in the [school district's] consistent and systematic exclusion of additional cumulative sick leave from severance pay, contrary to the express provision of the contract, constituted a waiver of the provision and agreement to amend the contract to allow for such exclusion.[54]

Though the appellate court reversed, its decision was based primarily on the procedural defect that the district had not affirmatively plead such a waiver in its initial response to the union's allegations. Amendment of the district's answer to include pleading on the waiver issue was not precluded in the court's remand to the trial court for rehearing.

Obligations of the representative during bargaining were highlighted in a New York case where retired teachers felt that calculation of their retirement allowances was in error. Their suit against the board was dismissed as against the board of education, inasmuch as the basis for the initial calculation that the board had followed was contained in the collective bargaining agreement. The court also found

---

53. School Comm. of Newton v. Labor Rels. Comm'n, 447 N.E.2d 1201, 1210 (Mass. 1983).

54. Butte Teachers' Union Local No. 332, AFL-CIO v. Board of Trustees, Butte School Dist. No. 1, Silver Bow Cty., 655 P.2d 146, 148 (Mont. 1982).

that the terms of the agreement extended to the retired members, who were bound by it. Union obligation in the matter was sharply focussed by the court's observation that "[i]f, as petitioners suggest, their interests were improperly overlooked by the union in reaching the settlement, then petitioners' remedy is against the union for breach of its duty to represent them in good faith."[55]

On the other hand, unions do not have to carry every grievance through to arbitration (where such is provided). They may refuse to process members' grievances at any stage, from initial filing to continued appeals, so long as they do not do so in bad faith, arbitrarily, or discriminatorily.[56] The principle extends, as well, to nonmembers' grievances, so long as nonmembership does not constitute the sole reason for such refusal. A nonmember in Florida was foreclosed from filing for arbitration of an alleged unfair labor practice by the collective bargaining agreement, which gave control over decisions to request arbitration to the bargaining unit.[57] A court in Pennsylvania ruled similarly, noting that an employee who feels that the union has inadequately represented him or her should file an unfair labor practice with the PERC rather than litigate.[58]

A court in New York underscored the broad responsibility that falls to unions by virtue of the collective bargaining agreement in noting the following regarding a teacher who was dissatisfied with the arbitrator's disposition of her grievance:

> As a member of the United Federation of Teachers, and subject to that union's collective bargaining agreement with the defendant board of education, plaintiff has abrogated her individual right to sue defendants for violations of that agreement, absent a showing that the union has breached its duty to represent her fairly.[59]

The obligaton of the employees' association to avoid contract or statutory violations was underscored in Idaho where, though the court ultimately ignored the behavior, it sternly lectured the association regarding its unlawful work stoppage and inflammatory statements made in the public press. Such actions, explained the court, could result in failure to meet the "clean hands" requirement, which "stands for the proposition that 'a litigant may be denied relief by a court of

---

55. Abrams v. Board of Educ., City of Yonkers, 456 N.Y.S.2d 798, 800 (N.Y. App. Div. 1982).
56. Stempien v. Civil Serv. Employees' Assn, 458 N.Y.S.2d 381 (N.Y. App. Div. 1983).
57. Galbreath v. School Bd. of Broward Cty., 424 So. 2d 837 (Fla. Dist. Ct. App. 1983).
58. Ford v. School Dist. of Philadelphia, 453 A.2d 705 (Pa. Commw. Ct. 1982).
59. Menkes v. City of New York, 457 N.Y.S.2d 99, 101 (N.Y. App. Div. 1982).

equity on the ground that his conduct has been inequitable, unfair and dishonest, or fraudulent and deceitful as to the controversy in issue.' "[60]

An obligation of the exclusive representative was established in a Florida case that, although it did not arise in a school, did come out of a public agency. Here, the PERC awarded attorney's fees to a hospital employer that had been required to defend itself in a discrimination case wherein, according to the court, "the union knew or should have known of the dearth of evidence of anti-union animus on the hospital's part, and that the charge was frivolous." Accordingly, said the court, the union's "unreasonable tenacity is grounds for an award of attorney's fees."[61]

Taken together, these cases indicate that the exclusive representative has clear obligations to avoid extremes in its pursuit of individual employee's or associational interests. It may neither carelessly shirk that duty nor callously pursue it with blind zeal. It must always be somewhere between the bipolar opposites.

3.5 SCOPE OF BARGAINING

3.5a Duty to Bargain

Such is the relative maturity of bargaining legislation and practices in most jurisdictions that generalized refusal to bargain rarely is charged by either side. It does arise, however, indirectly, such as refusal to bargain with newly certified units, either initial ones or ones newly certified during the pendancy of ratified agreements. Two such instances are discussed in section 3.3b. More often, duty to bargain arises regarding specific topics wherein one party perceives that a particular matter is a mandatory subject of bargaining, whereas the other feels it is either permissive or prohibited.

In Tennessee, a board's unilateral termination of its contributions to the employee group health insurance policy while negotiations were proceeding (impasse had not been declared) was found to be failure to bargain. The board's claim of inability to pay was found not persuasive.[62] Failure of the Regents of the University of Alaska to ratify a collective bargaining agreement that had been submitted to it was found not to be refusal to bargain in good faith.[63]

---

60. Gilbert v. Nampa School Dist. No. 131, 657 P.2d 1, 9 (Idaho 1983).
61. National Union of Hospitals v. Southeast Volusia Hospital Dist., 436 So. 2d 294, 296, 297 (Fla. Dist. Ct. App. 1983).
62. Smith Cty. Educ. Ass'n v. Anderson (Tenn. Ct. App. No. 88--30-11, 1983) ¶37,828, *supra* note 17 at 39,569.
63. Alaska Commun. Colleges Fed'n of Teachers, Local No. 2404 v. University of Alaska, 669 P.2d 1299 (Alaska 1983).

In Connecticut, a court found a board in violation of its statutory obligation to bargain in good faith by refusing to abide by a ratified agreement. The board had refused to provide the association with certain information it wanted to determine whether grievances would be filed regarding the district's elimination of several teacher-coordinator positions. The board partially complied, but refused to provide all the detailed information requested by the union, in part because some of the information had been destroyed and in part because of the board's belief that the grievances contemplated would be groundless and otherwise without merit. Both the PERB and the court found that the duty to bargain "requires an employer to provide relevant information that is needed by the representative for the proper perfection of his duties .... That obligation extends beyond the period of contractual negotiations to the union's need for information while administering and policing the contract."[64] The employer's convictions on the merits of the proposed grievances were found to be irrelevant.

Duty to bargain was extended into the duration of the agreement by a Massachusetts court that required a board to reopen bargaining when layoff not contemplated by the agreement became necessary. A general management rights clause was found not sufficient to overcome the employer's duty to bargain over unanticipated changes in conditions of employment.[65] Duty to bargain was similarly extended into certified impasse by a California court that turned aside a board's attempt to implement its last best offer unilaterally. Certified impasse procedures, the court reminded, do not signify the end of bargaining, but contemplate a continuation of the bilateral negotiations process. Mediation remains fundamentally a bargaining process albeit with the assistance of a neutral third party."[66]

In a case that is unusual only because duty to bargain disputes are seldom decided in favor of the employer's attempts to narrow the scope of its obligation, a board in Minnesota was permitted to reassign a teacher to teach part-time in an adjacent district. The action was found to be allowable both within the provisions of the collective bargaining agreement and within the proper exercise of management rights. The court was unpersuaded that the general requirement to bargain on the "impact" of management decisions was sufficient to reach the dispute at hand. A key factor in the decision was that the

---

64. West Hartford Bd. of Educ. v. State Bd. of Labor Rels., 460 A.2d 1255, 1258, 1259 (Conn. 1983).

65. Newton, *supra* note 53.

66. Moreno Valley Unified School Dist. v. Public Employment Rels. Bd., 191 Cal. Rptr. 60, 65 (Cal. Ct. App. 1983) (quoting, with approval, the language of the PERB in its initial disposition of the dispute).

criteria for selecting teachers for such assignment, though clearly a proper topic of bargaining, had never been included in the agreement.[67]

3.5b Interrelationship with Other Laws

Inasmuch as public sector bargaining functions wholly within statutory grants of authority, all such activities may be considered, ultimately, to be the product of interaction with other laws. This is particularly true of disagreements about mandatory, permissive, and prohibited topics of bargaining, each of which is nothing more than argument over the extent of the rights that remain with boards after compliance with bargaining legislation has occurred. These cases will be reviewed in subsequent sections; here, only the interaction between bargaining and other laws not directly derived from board's exclusive legislative powers will be discussed.

When collective bargaining and other statutes differ, there is general agreement with the Michigan court that found that "[w]hen there is conflict between PERA and another statute, the PERA prevails, diminishing the conflicting statute, *pro tanto*."[68] In a well-known and often-cited case in New Jersey, charges of racial discrimination in the appointment of a teacher to an extra-duty assignment were found to be controlled by and under the exclusive jurisdiction of the state's Division on Civil Rights. Advisory arbitration, however, was recommended.[69] In Kansas, provisions regarding notice for reduction in force decisions conflicted with the statutes and, thus, were found void.[70]

Nevertheless, agreements forged under collective bargaining statutes that are found to be at variance with preexisting laws may be upheld. The courts frequently find that modification of the statute is implicitly authorized by the enabling legislation, such as in Iowa and Illinois where the agreements were found to be controlling. (However the five-to-four decision and extensive discussion revealed the Iowa court's discomfort with the proposition.)[71] A provision of a city charter authorizing the school board to discharge employees "at its pleasure"

---

67. Ogilvie v. Independent School Dist. No. 341, 329 N.W.2d 555 (Minn. 1983).

68. Parks, *supra* note 8, at 647; Lincoln, *supra* note 26; Hotel, Motel, Restaurant Employees and Bartenders Union Local 737, AFL-CIO v. Escambia Cty. School Bd., 426 So. 2d 1017 (Fla. Dist. Ct. App. 1983).

69. Teaneck Bd. of Educ. v. Teaneck Teachers' Ass'n, 462 A.2d 137 (N.J. 1983).

70. Ottawa Educ. Ass'n v. Unified School Dist., 666 P.2d 680 (Kan. 1983).

71. Shenandoah Educ. Ass'n v. Board of Educ., Shenandoah Commun. School Dist., 337 N.W.2d 477 (Iowa 1983); Board of Educ., Bremen Commun. High School Dist. No. 228 v. Bremen Dist. No. 228 Joint Faculty Ass'n, 449 N.E.2d 960 (Ill. App. Ct. 1983).

was not sufficient to exempt a Massachusetts board from being required to bargain with a union over procedures to utilize in implementing unexpected layoffs not contemplated by the extant agreement. This court captured the essence of the matter when it commented that "[w]e do not attribute to the Legislature an intention to pass a largely ineffective collective bargaining statute as to public school employees .... The general discretion to act which school committees have is limited by their obligation to bargain stated in [the statutes]."[72]

Certain statutes that are quite independent of collective bargaining legislation impinge on negotiations and contract implementation. Confidentiality of personnel records, for example, became an issue in Connecticut where a district denied a union's request for extensive personnel data to prepare grievances over the appointment of its members to selected positions. Though the court granted the access requested, it noted that such right extended *only* to relevant information related to appropriate union concerns. Quoting an earlier decision, the court reviewed the established parameters:

> Although a union has the right to relevant information, that right can be subject to countervailing privacy interests. *Detroit Edison* decided that the employer's duty to provide relevant information does not extend to validated psychological aptitude tests or to the scores of individuals taking such tests. It concluded that serious consideration of privacy outweighed the union's need for the information and justified the union's need for the information and justified conditioning the disclosure of the test scores on the examinees' consent. The sensitivity of any human being to disclosure of information that may be taken to bear on his or her basic competence is sufficiently well known to be an appropriate subject of judicial notice.[73]

Collective bargaining practices sometimes come into conflict with provisions of open meeting laws, especially where the statues do not clearly exempt or include them. In Tennessee, the state's sunshine law was found to prevent a board from meeting privately with its attorney and chief negotiator; attorney-client privilege was found insufficient to obviate the requirements of the Act.[74] Similarly, in Texas, a permanent injunction was affirmed restraining district officials and board members from conducting meetings and public business by telephone. The San Antonio Teachers' Council had brought the action initially.[75]

---

72. Newton, *supra* note 53, at 1208.
73. West Hartford, *supra* note 64, at 1280.
74. Anderson, *supra* note 62.
75. Elizondo v. Williams, 643 S.W.2d 765 (Tex. Civ. App. 1982).

Legislation regarding school funds, particularly that either limiting a school board's capability to levy taxes or preventing deficit budgeting, comes into conflict with negotiated salary settlements from time to time. The issue is complicated in districts, such as Boston, where the city, not the Boston School Committee, provides the money for the schools, and the city political leaders follow strict "reduce the costs of government" platforms. There, last year's court decision requiring the city to fund the salary increases in a three-year agreement did not put all issues to rest. Because the mayor was determined to reduce the cost of government, he put great pressure on the school administration to help by reducing the school budget, which they did. In 1983 the city was back in court as a result, as the court described it, of "mayoral blandishments" having been successful in getting the school committee to reduce its request for money not allocated to teacher salaries. The union filed suit, claiming that the reduction would reduce the base for future school district funding. The court was unsympathetic, finding that the claims had "nothing to do with the executed bargaining agreements, but had to do with the future." Accordingly,

> the rights of the union in this matter are contractual in nature. It is a doubtful proposition, once the pay package of a collective bargaining agreement has been funded, as has occurred in this case, that the contractual bundle of rights for which the unions may press includes improving the economic environment for the next round of negotiations.[76]

However, in Pennsylvania, the Philadelphia City Council's failure to fully fund the school system's budget portended a $60 million deficit. The district took certain unilateral actions to eliminate it, including rescinding a wage increase and deleting certain fringe benefits, claiming that availability of funds was a "condition precedent" to performance of its contractual obligations. The union grieved the actions and both an arbitrator and a trial court ordered the district to restore the recissions. Although the commonwealth court reversed, the supreme court restored the trial court's original decision because,

> [I]n the instant case, we find that the District was required to establish impossibility of performance and failed to do so in the absence of a showing that it attempted performance by all possible means. Furthermore, there is nothing in the agreement stating that a balanced budget or any particular level of funding is a condition precedent to the payment of the agreed

76. Boston Teachers' Union, Local 66 v. Mayor of Boston, 451 N.E.2d 1169, 1173 (Mass. App. Ct. 1983).

> on salary and benefit increases. We find that the District had a duty to make such provision in the agreement if it wished to be excused.[77]

In sum, the burden of proof was on the district to show that the condition precedent did not exist.

The identical problem arose in Indiana and resulted in a similar outcome, with the appellate court upholding a trial court's ordering a district to implement the salary schedule of the ratified bargaining agreement despite claims of fiscal inability to do so.

> The Board of Trustees for the South Bend school did not clearly establish where its budget cuts were implemented. The Trustees made nothing more than a bald statement that they had made all feasible budget cuts, and the only expense remaining to be cut was the teachers' own salaries. The expenses of the teachers' salaries are a portion of the general fund. This general fund also covers numerous other expenses including equipment, maintenance, extracurricular activities, and other miscellaneous items. No attempt was made by the Trustees to prove which areas of the budget were cut. In this light it cannot be said that the Trustees proved that the teachers' contract was *the expense* within the general fund which "provides for deficit financing."[78]

A broad constraint placed on collective bargaining by legislation prohibiting various kinds of discrimination was established by a federal court in Connecticut. It found that strong federal constitutional and statutory policies against discrimination invalidated a "hold harmless" clause in an agreement to the extent that it would have required the union to pay the damages won in a gender discrimination suit arising from the district's having followed the agreement's provisions. In an interesting rationale, which seemed well calculated to be supportive of the union's treasury, the court reasoned as follows:

> It is true that unions, as well as employers, are prohibited from discriminating against employees by reason of sex and may be independently liable for discrimination. In that sense, allowing the unions here to bear the full economic impact of the Board's settlement of the claims of the five individual plaintiffs does not conflict with that policy, particularly when, as here, SEA [the union] apparently actively sought the discriminatory pay provision. Nevertheless, if the "hold harmless" clause is

77. Brotherhood of Firemen and Oilers, Local No. 1201, AFL-CIO v. Board of Educ., School Dist. of Philadelphia, 457 A.2d 1269, 1271 (Pa. 1983).

78. South Bend Commun. School Corp. v. National Educ. Ass'n, South Bend, 444 N.E.2d 348, 352 (Ind. Ct. App. 1983).

> enforceable, employers will have little reason to be concerned over whether labor agreements discriminate against women, knowing full well that if they are later found to have discriminated, they will be totally compensated for any injuries resulting from the discrimination. Labor unions, on the other hand, will have little incentive to pursue anti-discrimination claims or lawsuits when they are aware they will have to pay from their own pockets for the fruits of victory .... [T]he logical reason why the contract contained a "hold harmless" clause was because at least one of the parties (probably the Board) thought that there was a good chance that the pay schedule in the Agreement would be held discriminatory. This seems particularly true here since the "hold harmless" clause appears in the same article of the contract that incorporates the discriminatory pay schedule. To allow the Board to collect from the two unions would be to fully indemnify the Board for what was partly its own wilful misconduct, the effect of which was the commission of a civil wrong against a third person or persons.[79]

3.5c Proposals Within Mandatory Scope of Bargaining

In one jurisdiction or another, virtually every conceivable interaction that can occur between a board and its employees seems to have been found mandatorily bargainable despite the well-recognized principle that boards may not redelegate or surrender any of their legislative powers. Consequently, a topic-by-topic listing of what is bargainable would be difficult to compile and would be much less enlightening than lengthy. Even so-called prohibited subjects of bargaining are not exempt from the negotiations table because of the widespread application of the "impact" theory of bargainability. The theory means, according to the language of a Florida PERC ruling that was adopted without change by a Florida Appeals Court, that "*it is the effects of the decisions and not the decisions themselves* which are mandatorily negotiable."[80] When these effects are grieved it may be impossible for an arbitrator to avoid reviewing the justification for the original decision and, at this point, the differences between mandatory, permissive, and prohibited topics become quite less distinct than they appear in the language of legislation and court decisions.

In Kansas, a court attempted to keep the matter clear by defining mandatory topics as those that (1) are "significantly related" to a condition of employment and (2) would not "unduly interfere" with

---

79. Stamford Bd. of Educ. v. Stamford Educ. Ass'n, 697 F.2d 70, 73-74 (2d Cir. 1982).
80. Hillsborough Classroom Teachers' Ass'n v. School Bd. of Hillsborough Cty., 423 So. 2d 969, 970 (Fla. Dist. Ct. App. 1982).

management rights. In the case at hand, the court found that salary allocations for employee travel, criteria for promotion, selection of faculty to teach in summer school, procedures for achieving tenure, procedures for reduction in force, and employee access to their own personnel files at the university were mandatory topics of bargaining. The regents were found to retain the right to determine (1) who was to be promoted (after negotiated criteria and procedures were met); (2) whether to have summer school and what offerings to provide therein; and (3) when reduction in force was necessary.[81]

In California, the PERB had found that allocation of time during the teachers' workday between instruction, rest, and preparation was a proper topic of bargaining. The district's appeal was not on the particular items, per se, but was based on the allegation that the PERB, in general, was not authorized to develop and utilize a procedure for determining negotiability because of a "zipper" clause in the legislation that reserved "all matters not specifically enumerated" to board discretion. The court disagreed, approving, for that jurisdiction, the following three-step test that the PERB had developed to determine bargainability:

> A subject is negotiable even though not specifically enumerated if (1) it is logically and reasonably related to hours, wages, or an enumerated term and condition of employment, (2) the subject is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict, and (3) the employer's obligation to negotiate would not significantly abridge his freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the District's mission.[82]

An employer in Pennsylvania who invoked such a "zipper" clause as sanction for refusing to bargain on assignment of summer school employees and unilaterally imposing an employee parking fee as equally unsuccessful. The court ruled that "a union's waiver of the right to bargain on mandatory subjects during the term of an agreement will not be found in a boiler plate waiver clause alone." It similarly found past practice as insufficient to permit the employer to unilaterally impose a ban on smoking at the workplace in a nonschool setting.[83]

---

81. Kansas Bd. of Regents v. Pittsburg State Univ. Chapter, Kansas National Educ. Ass'n (Kan. No. 54,528, 1983) ¶37,804, *supra* note 17 at 39,639.

82. San Mateo City School Dist. v. Public Employment Rels. Bd., 663 P.2d 523, 528 (Cal. 1983).

83. Pennsylvania v. Pennsylvania Labor Rels. Bd., 465 A.2d 116, 118 (Pa. Commw. Ct. 1983); and *Id.*, 467 A.2d 1187, 1191 (Pa. Commw. Ct. 1983); both citing a previous decision, *Id.*, 459 A.2d 452, 457 (Pa. Commw. Ct. 1983).

Courts in other jurisdictions generally follow a similar track and either approve of employment relations boards' standards or fashion their own for deciding bargainability. Impact bargaining, for instance, when applied to layoff actions resulted in the following: *whether* to reduce in force is an exclusive management right, but *how to select and compensate* those affected is mandatorily negotiable.[84] Even a union that did not wish to do so was required to bargain the latter.[85] In Florida a list of topics over which the employer proposed to exercise unilateral control was required to be disclosed and bargained.[86]

Topics found to be not mandatorily bargainable (and, usually, by implication, permissive) included transfer and reassignment of a high school administrator to an elementary school where the action was not covered by the agreement and where compensation was not found to be substantially affected.[87] In Michigan, provisions and status of an agreement that required, inter alia, the district to bargain pension and retirement systems were found not to require bargaining over a district's unilaterally adopted practice of permitting certain retired teachers to work for the district up to twenty-five days per year to supplement their incomes. The fact that the retirees were found not to be performing work normally done by members of the bargaining unit was found to foreclose the association from grieving the matter, although the court noted that if such a practice took the form of contracting for bargaining unit work or became an incentive to early retirement that altered terms and conditions of employment, it would be mandatorily bargainable.[88]

3.5d Proposals Within Permissive Scope of Bargaining

Though the traditional triad of mandatory-permissive-prohibited for sorting topics of bargaining is widely applied, the New Jersey Supreme Court ruled that "New Jersey has only two categories of subjects of public employment negotiations: 'mandatorily negotiable terms and conditions of employment' and 'non-negotiable matters of government policy.' "[89] This test may broaden rather than constrict the parameters of bargaining because topics that in some jurisdictions

84. Newton, *supra* note 53; Shenandoah, *supra* note 71.
85. Saydel Educ. Ass'n v. Public Employment Rels. Bd., 333 N.W.2d 486 (Iowa 1983).
86. Palm Beach Junior College Bd. of Trustees v. United Faculty of Palm Beach Junior College, 425 So. 2d 133 (Fla. Dist. Ct. App. 1983).
87. Plainfield Ass'n of School Adm'rs v. Board of Educ., Plainfield, 453 A.2d 549 (N.J. Super. 1982).
88. West Ottawa Educ. Ass'n v. West Ottawa Bd. of Educ., 337 N.W.2d 533 (Mich. Ct. App. 1983).
89. Teaneck, *supra* note 69, at 139.

would be classified as permissive would inevitably fall into New Jersey's mandatory category.

A state of Washington court found that granting association employees released time for pursuing association business was a permissive topic of bargaining and, hence, endorsed the practice over the claim of the state auditor who challenged the practice as constituting an agreement beyond the statutory authority and being unlawful gift of public funds.[90] In Florida an association was permitted to refuse to bargain on the employer's propcsition to include a clause in the agreement stating that the employees' group would waive the right to bargain over the implementation of management prerogatives (an attempt to forestall the expansion of topics through impact bargaining?).[91]

No other cases were reported where clearly permissive topics of bargaining were explicated. Perhaps the growth of "impact" bargaining has resulted in this change.

3.5e Proposals Within Prohibited Scope of Bargaining

Despite the apparent encroachment on management prerogatives that impact bargaining connotes, several decisions reaffirmed the proposition that certain topics may not be bargained. Though it scarcely bears repeating because it is so broadly general as to be hopelessly meaningless in prospective application, no court has explicitly weakened the standard that a school board may not bargain away its legislative grant of authority to establish school policy and manage the schools. Decisions that recognized this principle at specific points of application found the following either to be prohibited topics of bargaining or proper exercise of management prerogatives: (1) whether to lay off employees;[92] (2) whom to promote;[93] (3) when transfers are required;[94] (4) class size and minimum staffing levels;[95] (5) decisions to discharge;[96] (6) the school calendar;[97] (7) which classes to offer;[98] and (7) whether to grant tenure.[99]

---

90. State *ex rel.* Graham v. Northshore School Dist. No. 417, 662 P.2d 38 (Wash. 1983).
91. Palm Beach, *supra* note 86.
92. Brotherhood, *supra* note 77.
93. Kansas, *supra* note 81.
94. Plainfield, *supra* note 87.
95. Hillsborough, *supra* note 80.
96. Goetz, *supra* note 14.
97. Eastbrook Commun. Schools Corp. v. Indiana Educ. Employment Rels. Bd., 446 N.E.2d 1007 (Ind. Ct. App. 1983).
98. West Cttawa, *supra* note 88.
99. Board of Educ., Carroll City v. Carroll City Educ. Ass'n, 452 A.2d 1316 (Md. Ct. Spec. App. 1982).

3.5f Terms of Collective Bargaining Agreements

Some cases arise where the primary issue is disagreement on the meaning of contract language, per se. Probably the most extensive discussion of terms of agreements occurred in Connecticut and California cases where the extent of "zipper" clauses was tested. In each instance it was found to be less encompassing than the employers had hoped. In the former state, the "hold harmless' clause was held insufficient to insulate the board from liability for contract-derived violations of civil rights. In the latter, a general management rights clause was not sufficient to reserve to the board's unilateral prerogatives all topics not specifically enumerated in the statutes.[100] In Florida, the employer's insistence on contract language requiring the union to waive, in advance, all rights to bargain over implementation of reserved management prerogatives was found to be an unfair labor practice.[101] In Illinois, language of the collective bargaining agreement that specifically bound the parties to comply with future laws made such legislation binding even where notice requirements of the agreement were thereby modified to the disadvantage of the employees.[102]

Language that stated that "the grievant and/or the Association" could pursue a grievance all the way to arbitration was interpreted in New York to mean that an individual teacher could invoke arbitration of a grievance over the expressed wishes of the association not to do so. In response to the union's claim that it held exclusive power to decide which grievances to arbitrate, the court answered that

> [t]his Court cannot find that each individual employee and union member, in becoming a beneficiary of the collective bargaining agreement between the Seneca Falls Central School District and Local 850, gave up to the union, as their respective representatives, the individual right to litigate their grievances to the contract. The only just and equitable interpretation to be afforded the particular arbitration clause used in the agreement must be construed as allowing the individual grievant-employee's rights to pursue their Demand to Arbitration without the union's endorsement.[103]

With a hint of pique, the court reviewed the term's various definitions in prior cases: "the abominable invention," "devoid of meaning" "incapable of classification by rules of grammar and syntax," "a

---

100. Stamford, *supra* note 79; San Mateo, *supra* note 82.
101. Palm Beach, *supra* note 86.
102. Krizek, *supra* note 22.
103. *In re* Seneca Falls Cent. School Dist., 459 N.Y.S.2d 689, 693 (N.Y. Sup. Ct. Seneca Cty. 1983).

grammatical monstrosity," and "confusing and should be condemned." Nevertheless, it concluded that the well-settled principle of contract law that prevents a person from taking advantage of "adroit and slippery language" compelled finding in this dispute that the term "and/or" plainly meant either party or both parties.[104]

The importance of the terms of agreements was underscored by a decision in Pennsylvania wherein a court found that the best indicator of whether the parties did or did not intend to submit a matter to arbitration was the language of the agreement, not abstract considerations of employer rights. According to the court, "[s]hould an employer wish to exclude areas from arbitration, it should do so through the collective bargaining process rather than by asking the courts to rectify the employer's oversights and/or shortcomings in evidencing its intent through the collective bargaining agreement."[105]

3.6 GRIEVABILITY AND ARBITRABILITY

Generally speaking, courts consider grievability and arbitrability as being closely associated. Though it is unquestioned that if a matter is not grievable, it is not arbitrable, not all matters are grievable and not all grievable matters are necessarily arbitrable: the collective bargaining agreement, for instance, may foreclose arbitrable disposition of certain disputes. So also may statutes, the interpretations of which are beyond the reach of arbitrators, who are limited to interpreting terms of agreements.[106] A midground is reached from time to time, as in decisions that advise and give weight to advisory arbitration.[107]

3.6a Presumption of Arbitrability

Despite occasional decisions against it, a strong and consistent presumption favoring arbitration exists among the courts in all jurisdictions. So strong is it that the fact that the arbitrator could not grant the relief sought (creation of a new position and appointment of a teacher to it) was found not to preclude submission of the matter to arbitration. According to the court the arbitrator could, if warranted,

---

104. *Id.* at 693, 694.

105. East Pennsboro Area School Dist. v. Pennsylvania Labor Rels. Bd., 467 A.2d 1356, 1361 (Pa. Commw. Ct. 1983).

106. Teaneck, *supra* note 69; Seneca Falls, *supra* note 103; Neshaminy Fed'n of Teachers v. Neshaminy School Dist., 462 A.2d 629 (Pa. 1983); Plainedge Fed'n of Teachers v. Plainedge Union Free School Dist., 460 N.Y.S.2d 502 (N.Y. App. Div. 1983); Board of Educ., Farmingdale Union Free School Dist. v. Farmingdale Fed'n of Teachers, 459 N.Y.S.2d 790 (N.Y. App. Div. 1983).

107. Walker Cty., *supra* note 27; Teaneck, *supra* note 69; Plainedge, *supra* note 106.

fashion an alternative award that would be within the terms of the collective bargaining agreement.[108] An Iowa court extended the presumption into approving the arbitrability of decisions as to which teachers should be selected for layoff. It would not, however, extend so far as to have cases involving discharge subjected to the process.[109]

In affirming the "broad presumption favoring arbitration," a Maine court found not only that the collective bargaining agreement contained the intention that dismissal of nonprobationary teachers was to be subjected to arbitration, but also that the statutes permitted such an agreement. The court distinguished between the relative risks inherent in broad scope interest and broad scope grievance arbitration as follows: "interest arbitration is a valid delegation only if accompanied by adequate standards or safeguards to protect against unfair and arbitrary decisions. . . . Grievance arbitration in the case before us, does not present a similar risk of policy-making without accountability."[110]

Arbitration was extended, in Illinois, to cover a dispute over whether a statutory grant of board prerogative to establish sick-leave policy was limited by the terms of the agreement. The court found that, "at the very least, the Board's new sick-leave policy presents a question of whether that new policy is compatible with the sick-leave provision in the agreement. Thus, we hold that the Board's unilateral change regarding its sick-leave policy presents an arbitrable issue."[111]

On the other hand, a New York court found the reasons for the dismissal of a nonprobationary teacher not arbitrable because "[i]t is beyond the power of a board of education to surrender its authority and responsibility to make the substantive determination of whether to grant tenure, and any contractual provisions which interfere with this nondelegable function are unenforceable as against public policy."[112]

3.6b Who Determines?

Resolution of questions as to who determines grievability and arbitrability is made by any of the three "third-party" adjudicators of disputes in typical collective bargaining arrangements—arbitrators,

---

108. Paloumpis v. Onondaga Commun. College Fed'n of Teachers, AFT Local 1845, 467 N.Y.S.2d 447 (N.Y. App. Div. 1983).
109. Shenandoah, *supra* note 71.
110. Cape Elizabeth, *supra* note 30, at 172.
111. Board of Educ. of Arbor Park School Dist. No. 145, Cook Cty. v. Ballweber, 451 N.E.2d 858 (Ill. 1983).
112. Board of Educ., Elwood Union Free School Dist. v. Elwood Teachers' Alliance, 461 N.Y.S.2d 891, 892, 893 (N.Y. App. Div. 1983).

employment relations commissions, or the courts. Indeed, each one, by hearing and ruling on disposition of grievances and/or other disputes, implicitly rules on the primary questions of arbitrability and jurisdiction. A court in Oregon made this explicit when it commented that "with few exceptions, every court has the power, even the duty, to determine whether it has jurisdiction to decide the matter before it."[113] Three principles, each of which is heavily influenced by the presumption of arbitrability that pervades the entire process, are clear from decisions examining who should determine whether a topic is a proper subject of grievance and arbitration: (1) arbitrators are limited to interpreting the terms of collective bargaining agreements;[114] (2) if questions of law are implicated, the courts must decide;[115] and (3) if unfair labor practices are alleged, employment relations boards or commissions have original and sometimes exclusive jurisdiction.[116]

Nevertheless, every possible dispute that can arise between employees and employers is not thereby deftly sorted. In many instances, the claims overlap so much that distinctions are blurred between arbitrability, per se, and the substance of the dispute. Further, jurisdictional overlap is exacerbated by the fact that employment relations boards and commissions are typically the first appellate level for all arbitrator decisions. When challenges do arise, according to a Wisconsin court, "the question of substantive arbitrability—whether the parties agreed to submit an issue to arbitration—is a question for the courts to decide."[117]

The difficulty of applying these three standards of arbitrability prospectively was illustrated in a California case wherein the court ruled that the state's PERB could (and should) rule on a challenge to the university's refusal to grant a union access to the internal mailing system, an expressed right given in the state's Higher Education Employer-Employee Relations Act. The problem had arisen because the peculiar nature of the mailing system resulted in both inhouse mail and the United States mail being carried over the same or similar routes, invoking postal regulations prohibiting private conveyance over any established United States Postal Service routes. Despite the clear statutory basis of the matter, the court, while conceding that the PERB was not empowered to determine whether the California statutory

113. School Dist. No. 115, Clackamas Cty. v. Oregon School Employees' Ass'n, Chapter 66, 669 P.2d 821, 823 (Or. Ct. App. 1983).
114. Neshaminy, *supra* note 106.
115. Bailey v. Ferndale Area School Dist., 454 A.2d 207 (Pa. Commw. Ct. 1982).
116. *In re* Jefferson Twp. Educ. Ass'n, 457 A.2d 1172 (N.J. Super. Ct. 1982).
117. Whitewater Educ. Ass'n v. Whitewater Unified School Dist., 335 N.W.2d 408, 410 (Wis. Ct. App. 1983).

grant was preempted by federal postal law, found that the PERB could examine both in light of the complaint and attempt to harmonize them. Accordingly, it was not prevented from "*consulting* federal law in order to determine whether the state statute may be enforced without offending relevent federal regulations. An administrative agency still remains free to *interpret* the existing law in the course of discharging its statutory duties."[118]

In Florida, the PERC was found to have exceeded its authority when it rejected an arbitrator's determination that administrative witnesses were not credible, consequently rejecting their claim that certain nonrenewals were a legitimate exercise of management rights and finding that the actions were an impermissible retaliation for protected union activity. The mere fact, according to the court, that two contrary conclusions were plausible does not render the one selected incorrect.[119] Also in Florida, arbitrability was decided by the terms of an agreement that gave the certified bargaining agent control over the decision to seek arbitration. When the unit "found that appellant's grievance lacked merit and refused to process it through the arbitration stage .... Appellant was thereby foreclosed from arbitration."[120]

The PERC in New Jersey was permitted to refer an allegation of unfair labor practices to a hearing officer for gathering evidence and even to make a recommendation, but could not submit resolution of the matter to binding arbitration. The commission, itself, had found the dominant issue to be discrimination for participating in association activities, which made the matter an unfair labor practice charge and, therefore, within the exclusive jurisdiction of the commission.[121]

In Missouri, an appellate court distinguished between *contested* and *noncontested* cases under the state's judicial procedures in determining its own authority to dispose of appeals. For cases in the former classification, it found that

> [t]he agency determines the facts, an exercise not only judicial but also mingled with legislative [or executive] discretion and expertise. To maintain the integrity of that mixed administrative function, and to avoid an unlawful encroachment, therefore, the court of appeals reviews the administrative decision—and not that of the circuit court which has no power to find the facts—for legal sufficiency and lawfulness. For

118. Regents of the Univ. of California v. Public Employment Rels. Bd., 189 Cal. Rptr. 298, 301 (Cal. Ct. App. 1983).
119. F.U.S.A., FTF-NEA v. Hillsborough Commun. College, 440 So. 2d 593 (Fla. Dist. Ct. App. 1983).
120. Galbreath, *supra* note 57, at 838.
121. Jefferson Twp., *supra* note 116.

> that very reason, the court of appeals may not find a fact neglected by the agency, but essential to decision but must remand to the agency for that exercise of exclusive jurisdiction.[122]

In the case at hand, however, which it classified as *noncontested*, the court reversed the trial court's judgment against an employee because certain facts germane to the decision had been overlooked. It found authority to rule based on the overlooked evidence because

> [i]n a *noncontested* case, the circuit court and not the administrator adjudicates the evidence, and the facts found are a product of a judicial function only without mix of legislative or other governmental considerations—an exercise interdicted to a court. The court of appeals reviews the judgment of the circuit court—both as to the law and evidence components, and not the decision of the administrative body. In such a case, where the review shows that the findings of the circuit court neglects [sic] a fact essential to judgment, the judgment does not rest on substantial evidence and may not stand.[123]

A trial court's finding that the management rights clause in an agreement foreclosed an arbitrator from ruling on a challenge to the reassignment of a teacher was reversed by an appellate court, which found that the issues raised went to the "merits" of the grievance more than to considerations of reserved management rights. Disposition of the issue, therefore, was the exclusive domain of the arbitrator and could not be ruled on further by the courts.[124]

Jurisdictional bounds were not permitted to foreclose an employee from litigating as well as receiving arbitration in a mixed-charge allegation in Massachusetts. The teacher had filed for arbitration and found that the collective bargaining agreement did not provide for arbitration of her particular grief (demotion). Inasmuch as state laws were implicated in the definition of her status, her suit for redress was entertained over the objections of the school committee that her original election of arbitration was conclusive. In affirming her reinstatement by a trial court, the appellate court noted that "the election mentioned [in the statutes] assumes a collective bargaining agreement that allows the particular resort to arbitration, not one that repels it. The [trial] judge saw the anomalous and unfair consequences in the present case of a contrary view."[125]

---

122. Phipps v. School Dist. of Kansas City, 645 S.W.2d 91, 99 (Mo. Ct. App. 1982).
123. *Id.* at 100.
124. West Shore Educ. Ass'n v. West Shore School Dist., 456 A.2d 715 (Pa. Commw. Ct. 1983).
125. Fogarty v. School Comm. of Palmer, 448 N.E.2d 783, 785 (Mass. App. Ct. 1983).

In a California case, an exclusively statutory dispute regarding overtime and holiday calculations due four-day-week employees was found to be proper for judicial disposition. An order was issued in their favor, including instructions for the trial court to determine damages (back-pay) due.[126] Where the record was ambiguous as to whether the issue was a matter of law or interpretation of an agreement, a New York court returned a question regarding retroactive pay to the arbitrator for clarification on whether he considered his award binding or advisory.[127]

Exclusivity of jurisdiction varies according to differing states' legal context for bargaining. In Washington, where the PERC asserted exclusive jurisdiction over unfair labor practices, the court disagreed, revealing that it was unable to find such limitation in the statutes:

> Every administrative agency must interpret the law in order to enforce or to follow it. it is a quantum leap in logic, however, to jump from the fact that PERC is empowered to prevent unfair labor practices to the conclusion that PERC is the exclusive decider of public labor law questions.[128]

Three cases in West Virginia found that the state superintendent of schools was a proper source of review for grievance rulings of county boards of education.[129] With some impatience, an Indiana court, affirming a trial court decision finding that a statute forbidding deficit financing did not, thereby, permit a district to change unilaterally the wage and benefits provisions of a signed collective bargaining agreement, made the following comment on jurisdiction: "A complainant who seeks the jurisdiction of the court cannot be heard to complain that the court lacks jurisdiction in the matter when the justice rendered is not to the complainant's satisfaction."[130]

3.6c Remedy as a Factor in Arbitrability

Occasionally a case focuses on the remedy before the award is granted. Here, as in other challenges to arbitrators' decision, the broad commitment that exists to support the outcomes of arbitration places

---

126. California School Employees' Ass'n v. Oakland Unified School Dist., 190 Cal. Rptr. 464 (Cal. Ct. App. 1983).
127. Farmingdale, *supra* note 106.
128. Graham, *supra* note 90, at 43.
129. State *ex rel.* Board of Educ., County of Wood v. Truby, 300 S.E.2d 109 (W. Va. 1983); State *ex rel.* Board of Educ., County of Wyoming v. State Superintendent of Schools, 300 S.E.2d 108 (W. Va. 1983); State *ex rel.* Board of Educ., Kanawha Cty. v. Truby, 301 S.E.2d 862 (W. Va. 1983).
130. South Bend, *supra* note 78, at 351.

a heavy burden of proof on those who seek exemption from an arbitrator's award. A decision in New York illustrates this point. In approving an award that established a formula for additional teacher pay due because of increases in class size, the court commented that an arbitrator "may do justice and the award may well reflect the spirit rather than the letter of the agreement."[131]

A clear-cut prospective ruling on a remedy prior to its having been awarded occurred in the same state. The issue arose when the relief sought was for the arbitrator to create a new position and then assign the grieving teacher to it, action clearly beyond arbitral powers. In ordering the dispute, nevertheless, to proceed to arbitration, the court ruled as follows:

> That the arbitrator cannot necessarily grant the relief requested does not preclude submission of the dispute to arbitration. Arbitrators have broad powers to fashion relief and a court, in deciding an application for a stay, should not assume in advance that the remedy granted will be an impermissible one. The dispute, therefore, should proceed to arbitration and, if an award is warranted, for the fashioning of such an award as is permitted by the collective bargaining agreement.[132]

Nevertheless, where the demand for arbitration challenged as "arbitrary and capricious and without just cause" a board's denial of tenure to a teacher, the court found the matter nonarbitrable because that language too closely implicated the substantive validity of the reasons given. The court distinguished between this and the specificity of reasons given, however, and remanded the dispute and whether or not contractual processes had been met to arbitration.[133]

3.6d Procedural Issues

The importance of proper procedures that characterize formal judicial proceedings has been transplanted into the administrative hearings that initially consider much, if not most, of the employer-employee disputes that are referred to formal third-party disposition. The strictness of the standards, however, is relaxed somewhat, with appellate judges typically focussing more on labor relations laws' intentions to resolve differences at the lowest possible, nonlitigious level, rather than on overly strict adherence to procedural requirements, particularly where employee security or direct economic interests are at

131. Board of Educ. of Dover Union Free School Dist. v. Dover-Wingdale Teachers' Ass'n, 467 N.Y.S.2d 270, 273 (N.Y. App. Div. 1983).
132. Paloumpis, *supra* note 108, at 448.
133. Elwood, *supra* note 112.

stake. For instance, not returning their executed contracts until five days (during three of which the schools were closed) after the statutory deadline was held insufficient to trigger automatic presumption of resignation for two teachers. The court based its confirmation of an arbitrator's restoring them on three principles: (1) resignation must be, according to law, a voluntary, conscious, deliberate act—it cannot be the product of minor oversight; (2) there was no adverse impact on the employer; and (3) the employer itself had missed statutory deadlines in its tendering of the documents.[134] (See discussion of the "clean hands" doctrine in section 3.4c.)

A New York court treated timeliness similarly, though finding against the teachers, who charged that the employer's notification of their dismissal was void because it had been delivered prior to day twenty of a twenty-day statutory requirement. In reversing its earlier ruling that the requirement in the statute meant *twenty* days, neither more nor less, the court conceded that

> [w]e have previously held such a defect to be jurisdictional, requiring dismissal of the proceeding unless waived, but further analysis compels us to abandon such a rigid rule. . . . That the Legislature did not intend the 20-day notice requirement to be inflexible is readily apparent from its provision for shorter notice by order to show cause. Moreover, due process requirements are satisfied as long as respondents received notice reasonably calculated, under all the circumstances, to apprise them of the proceeding and afford them an opportunity to defend. Accordingly, where, as here, respondents are properly served with the petition and notice of petition, the better rule, and the one which we now adopt, treats a return date which does not meet the 20-day requirement of [Civil Practice Law and Rules] as a defect or irregularity which, pursuant to [them,] shall be disregarded in the absence of substantial prejudice to a party.[135]

Timeliness requirements cannot be ignored with impunity, however. In New York and Iowa, teachers' failure to meet filing requirements of the grievance procedures and education law foreclosed their bringing court action to recover for having been suspended and terminated.[136] But this is far from absolute. According to a Pennsylvania court, which rejected the district's claim that an arbitrator's award should be revoked because the grievance was filed after the fifteen-day time limit set forth in the agreement,

---

134. Whitewater, *supra* note 117.

135. Brown v. Casler, 469 N.Y.S.2d 165, 167, 168 (N.Y. App. Div. 1983).

136. Alderstein v. Board of Educ., City of New York, 466 N.Y.S.2d 973 (N.Y. App. Div. 1983); Feree v. Board of Educ., Benton Commun. School Dist., 338 N.W.2d 870 (Iowa 1983).

> [w]here, as here, there is no limitation in the Agreement prohibiting an arbitrator from deciding procedural issues, our Supreme Court has refused to upset an arbitrator's resolution of such issues even where such resolution involves an arbitrator's finding that a grievance filed *after* the time limitation stated in the Agreement is nevertheless arbitrable.[137]

Procedural actions on the part of either party may, under certain circumstances, constitute a waiver of right to arbitration. In denying a teachers' association access to arbitration after its having lost on certain aspects of a reinstatement and salary placement claim in a civil suit, the court found that

> [a] party can waive his right to arbitration by deliberate election to proceed with a court action for the determination of his claim. Here, the grievants and others elected to pursue their claims through the courts. By participating in those earlier proceedings, although on behalf of others than the grievants, the teachers' association waived its right to submit the contractual salary dispute to arbitration.[138]

A district in Rhode Island, which filed for arbitration just two days prior to trial after having prepared for litigation for over two years, was deemed to have waived the right to administrative disposition of the issue.[139]

On the other hand, teachers in Massachusetts and Iowa were permitted to litigate after arbitration had been elected.[140] In the Iowa case, where dismissal of a teacher was at stake, no less than three parallel sets of hearings had occurred. The supreme court, while finding that arbitration of termination decisions was an impermissible violation of legislative intent, felt that

> [i]t is extremely unfortunate that the parties here struggled through so many hearings and procedural difficulties leading up to this decision on the merits. Concurrent or parallel grievance procedures and statutory appeal proceedings should be avoided by public employers, their employees and collective bargaining organizations whenever possible. We recognize that under some circumstances more than one evidentiary hearing on multiple factual and legal issues pertaining

137. Pittston Area School Dist. v. Pittston Area Fed'n of Teachers, Local 1590, 456 A.2d 1148 (Pa. Commw. Ct. 1983).

138. East Ramapo Cent. School Dist. v. East Ramapo Teachers' Ass'n, 457 N.Y.S.2d 558, 560 (N.Y. App. Div. 1983).

139. North Smithfield Teachers' Ass'n v. North Smithfield School Comm., 461 A.2d 930 (R.I. 1983).

140. Fogarty, *supra* note 125; Shenandoah, *supra* note 71.

> to teacher termination may be necessary. Here, however, much duplication of effort could have been avoided.[141]

In two cases during the year, districts were found to have waived their rights to judicial review of arbitration awards by procedural defects. In both cases they had failed to contest arbitrability during initial hearings.[142]

The procedural defect most frequently charged is that one or the other of the parties failed to exhaust all administrative remedies prior to litigating. The general rule is that if the claim is related (defined broadly) to the agreement, grievance arbitration procedures must be exhausted prior to obtaining a court hearing.

Further, the doctrine of collateral estoppel typically binds disputants to whatever decision they receive first, so long as the agency (or court, for that matter) rendering it does so without error. For instance, the doctrine bound an arbitrator in Connecticut to a decision of the state's Labor Relations Board that paying union administrators who were displaced into the teachers' union salaries larger than the teachers' schedule would have brought did not implicate the teachers' union sufficiently to allow it to grieve the matter. The matter was complicated by the fact that the pay was calculated pursuant to the agreement the board had with the administrators' union. Parallel claims had been filed before both the arbitrator and the LRB, with the two handing down exactly opposite rulings.[143]

Where both teachers and boards failed to exhaust appropriate administrative procedures, they were required to do so prior to receiving court adjudication, even in issues regarding interpretation of state statutes regarding professional status, pay owed, and a constitutional claim arising from alleged transfer due to union activity.[144]

Nonetheless, two teachers in New York were permitted to seek judicial review of their claims of improper salary increases in a new assignment and unjustified disciplinary salary penalties, where the relief sought was mandamus and the statutes specifically provided for judicial disposition of that writ. The dispute had arisen when the district reassigned a teacher, preventing him and his spouse from riding to work together. Their response to the action included unauthorized

---

141. Shenandoah, *supra* note 71, at 482.

142. West Shore, *supra* note 124; Otselic Valley Cent. School Dist. v. Otselic Valley Teachers' Ass'n, 458 N.Y.S.2d 329 (N.Y. App. Div. 1983).

143. New Haven Bd. of Educ. v. New Haven Fed'n of Teachers, Local 933, 462 A.2d 389 (Conn. Super. Ct. 1982).

144. Racunas v. Ringgold School Dist., 452 A.2d 917 (Pa. Commw. Ct. 1982); Schussel v. Weinberger, 562 F. Supp. 819 (D. Mass. 1983); Muldrow v. Pinkley, 436 So. 2d 288 (Fla. Dist. Ct. App. 1983).

tardiness and absences, leading the district to impose disciplinary salary deductions. The penalties were found to be permitted by the agreement, but the district's refusal to pay for additional time required in the new assignment was not upheld.[145] On the other hand, a district's request for judicial review of an administrative commission's decision was denied in Kansas because of a procedural defect. The court found the commission's order technically "not yet final" and, hence, not reachable by judicial declaratory ruling.[146]

3.6e Management Prerogatives as a Bar

Despite the presumptions of arbitrability discussed in sections 3.5 and 3.6, boards still retain broad grants of nondelegable discretionary authority that have not been limited by enabling legislation providing for collective bargaining. Inasmuch as the inherent law right of boards, as employers, to control their employees is precisely the domain of highest employee interest and sensitivity, both labor legislation and employee practice are aimed directly at placing limits on the unrestricted exercise of this power. It should occasion no surprise, therefore, that this awareness leads both parties to attend carefully to perceived encroachments of the other. Frequently these perceptions are mutually exclusive; more than few of them result in litigation.

Management rights were upheld in a number of such cases; even where the decisions went against the district's action, courts usually reaffirmed at some length the existence of nondelegable rights. In an Idaho case, for instance, the supreme court upheld a trial court's finding of sufficient evidence to impute to the board a change in practice that required bargaining. Despite the ruling, the court stated that "[o]nly a Board of Trustees of a school district can adopt policies for a district."[147] The board had argued unsuccessfully that attaching to individual teacher contracts provisions of employment that were different from the collective bargaining agreement had the effect of changing it.

Two decisions affirmed exclusivity of board control over the curriculum: one found nonbargainable the board's decision to move behind-the-wheel drivers' education to outside of the regular school hours, and the other found the board's decision to drop a dance course not mandatorily bargainable.[148]

---

145. Saltz v. Board of Educ., City of New York, 461 N.Y.S.2d 692 (N.Y. Civ. Ct. 1983).
146. Unified School Dist. 251 v. Secretary, Kansas Dep't of Human Resources, 661 P.2d 1248 (Kan. 1983).
147. Robinson v. Joint School Dist. No. 331, 670 P.2d 894 (Idaho 1983).
148. Parsippany-Troy Hills Educ. Ass'n v. Board of Educ., 457 A.2d 15 (N.J. Super. Ct. 1983); West Ottawa, *supra* note 88.

The board's right to terminate a science teacher due to lack of curricular need for his services was upheld against a department of public instruction's recommendation that the school's science program be expanded and charges that the required hearings were biased because three board members who had participated in the initial hearing also participated in a rehearing. The court found the charges of bias to be merely "unfounded belief" and, in accepting an administrative proceeding's finding on the merits, stated that

> [w]e will not second-guess the Board's decision not to follow the DPI recommendation in a policy area such as this. We adopt the adjudicator's conclusion in this regard as our own: "The adjudicator has no authority to decide which is the wiser policy. Iowa law leaves educational policy to school boards. On the other hand, this discretion is not a blank check to override the legitimate interests of teachers in job security. Accordingly, the test for the adjudicator is whether this policy choice was characterized by an abuse of discretion, was a clearly unwarranted exercise of discretion, or otherwise was arbitrary and capricious. In the adjudicator's opinion, though strong arguments can be made contravening the board's policy choice, that choice does not manifest such a lack of reasoned thought to come within the statutory language regarding abuse of discretion as to warrant reversal of the board."[149]

When a board in New York reduced its summer work force due to declining enrollment and automation of scheduling, a court found the actions within proper exercise of management rights and did not require the matter bargained.[150] A board's prerogatives were narrowly (three-two) upheld in a case where the board unilaterally and without compensation evicted the teachers' union from office space it was using without charge in a school building. The court, in supporting the district, expressed more concern about statutory proscriptions against use of public facilities by private parties than about the board's abstract right to reclaim property it had loaned. An interesting and vigorous dissent based on equal protection was lodged.[151]

On the other hand, where a board's reduction-in-force practices were found to violate the collective bargaining agreement, the arbitrator's award of reinstatement and back pay, including interest, was found not to impinge on management rights. The board had contended, inter alia,

---

149. Olds, *supra* note 25, at 772.
150. Vestal Teachers' Ass'n v. Newman, 463 N.Y.S.2d 932 (N.Y. App. Div. 1983).
151. *In re* Board of Educ., Connetquot Cent. School Dist., 459 N.Y.S.2d 624 (N.Y. App. Div. 1983).

that the award improperly dictated the terms of what should, at most, be bargained.[152]

Personnel actions of various kinds generate many disputes about the extent of management rights or, at least, the impact of their being exercised. Board prerogative to determine that a permanent substitute teacher was not covered by the collective bargaining agreement was upheld in New York. Despite its having adopted the recommendation of an advisory arbitrator, the board's decision was found to be its own and well within its own discretion.[153]

Boards' rights to assign teachers were challenged in four cases. In Illinois, requiring the board to arbitrate whether it had followed the procedures it had agreed to in the agreement was not barred as being an erosion of management prerogatives. Neither was the requirement that it submit to arbitration a question regarding its implementation of the agreement's requirements for assignment of teachers to substitute duty.[154] In Pennsylvania, arbitration of a board's practices in assigning teachers to extra duty was not found to encroach on its prerogatives, but in New Jersey, binding arbitration of the board's prerogative *not* to assign a teacher to an extracurricular assignment was barred by preemptive civil rights statutes.[155]

In Minnesota, the provisions of state law and a collective bargaining agreement combined to permit the board to assign, without bargaining, a teacher to part-time service in two districts, thus increasing his travel (it was arranged, however, within his duty day). The court reviewed an earlier decision in which it had examined at length the point at which impact bargaining would converge with management prerogatives and, thus, be barred.

> Impact upon the terms and conditions of employment of an inherent managerial policy decision to divest certain positions of administrative functions does not render the manner in which the basic decision is made a subject of mandatory negotiations. The criteria and procedure for carrying out a reduction in supervisory personnel was so inextricably interwoven with the inherent managerial policy decision concerning the organizational structure of the school district that requiring the school district to meet and negotiate which positions to divest of administrative functions would have required the school district to negotiate the basic decision—a matter of inherent managerial policy which it has no obligation to negotiate.[156]

---

152. Newton, *supra* note 53.
153. Plainedge, *supra* note 106.
154. Board of Educ., North Palos Elem. School Dist. No. 117 v. Williams, 454 N.E.2d 773 (Ill. App. Ct. 1983).
155. *In re* Wellsboro Area School Dist., 467 A.2d 1197 (Pa. Commw. Ct. 1983); Teaneck, *supra* note 69.
156. Ogilvie, *supra* note 67, at 558.

The teacher's claim in this dispute was further weakened by the fact that the collective bargaining agreement was silent on the subject of transfers to out-of-district assignments.

Encroachment on management prerogatives was not permitted by a Pennsylvania court that refused to extend the language of an agreement providing for arbitration of disagreements over employee discipline to a case regarding dismissal.[157]

Two boards in Ohio were unsuccessful in convincing the state's supreme court that their having agreed to provide reasons for nonrenewal was unenforceable due to statutory grants of authority and limitations of certain notice dates.[158] Regarding the claim that the statutory provisions could not be modified by an agreement, the court stated:

> The mere fact that R.C. 3319.11 creates a statutory precondition to the non-renewal of a nontenured teacher's contract by requiring delivery of written notice on or before April 30 of the board's intention not to re-employ, does not preclude a board of education from guaranteeing that teacher additional procedural safeguards when termination is contemplated. Instead, R.C. 3319.11 should be viewed as a teacher's protection statute designed to provide minimum procedural safeguards. Thus, contractually created procedural requirements relating to nonrenewal, contained in collective bargaining agreements and arrived at through open negotiation, are enforceable so long as the procedures do not directly conflict with [the statute].[159]

A rather unusual award regarding nonrenewal was upheld in New York, where an arbitrator extended the probationary period for achieving tenure one year beyond the statutory provisions. Although the district had failed to comply with the evaluation procedures of the collective bargaining agreement, it argued that the award violated public policy by extending the probationary period. The court disagreed, finding that

> [t]he district's public policy argument is meritless. Contrary to the district's contention, the evaluation provision, as construed by the arbitrator, does not infringe upon any substantive aspect of the district's responsibility and authority to make tenure decisions. Rather, it merely imposes certain procedural

157. Neshaminy, *supra* note 106.
158. Tracy v. Otsego Bd. of Educ., 453 N.E.2d 610 (Ohio 1983); Struthers City Schools Bd. of Educ. v. Struthers Educ. Ass'n, 453 N.E.2d 613 (Ohio 1983).
159. *Id.* at 615.

requirements which must be complied with before a probationary appointment can be terminated. Such bargained-for supplemental procedural steps preliminary to the final action of granting or withholding tenure are not violative of public policy.[160]

3.6f Tenure Issues

Teachers who have attained tenure whether via provisions of a collective bargaining agreement or by statute enjoy extraordinary protection against employer abrogation of the property interest their status affords them. These protections arise in two different contexts: (1) whether tenure exists for a particular teacher claiming it for the first time, and (2) how permanent is the protection of tenure against layoff or just-cause discharges.

Whether tenure had been attained was the issue in New York, where the court found that the substantive review of the board's reasons for denying tenure was not arbitrable but its compliance with procedures for determining that substantive decision was, including questions regarding the specificity of the charges cited.[161] In two New York cases, teachers attempted to achieve tenure status by claiming that tenure areas separate from those of the regular teaching staff had been established for them. One was denied her claim that the collective bargaining agreement in force at the time she had signed her letter of intent established her tenure area as K-12 reading specialist rather than in an elementary area. The court was unconvinced, ruling that the agreement in force at the time she actually began her employment was determinative of her status.[162] The claim of guidance teachers that their assignments constituted a separate tenure area was returned by the court to arbitration to determine whether provisions of the collective bargaining agreement would resolve the dispute.[163]

In Arkansas, teachers were denied their attempt to establish vested property interest and tenure protection by invoking, in the court's words, "the mere statutory requirement" that a district could not act arbitrarily in nonrenewal of teacher contracts.[164]

---

160. Broadalbin Teachers' Ass'n v. Broadalbin Cent. School Dist., 469 N.Y.S.2d 217, 218 (N.Y. App. Div. 1983).
161. Elwood, *supra* note 112.
162. Horowitz v. Board of Educ., East Ramapo Cent. School Dist., 465 N.Y.S.2d 67 (N.Y. App. Div. 1983).
163. Board of Educ., Porterville Cent. School v. Porterville Faculty Ass'n, 465 N.Y.S.2d 335 (N.Y. App. Div. 1983).
164. Sutton v. Mariana School Dist., 573 F. Supp. 159 (E.D. Ark. 1983).

The extent to which tenure, once granted, survives against layoff or just-cause charges was tested on several occasions. (Extended discussion of discharge of tenured employees appears in chapter 2 of this volume; consequently, it will not be repeated here.) Two cases examined whether, under Massachusetts law, tenure survives layoff. Although all possible permutations of the rule were not covered definitively, the state's supreme court found that tenured teachers are entitled to restoration of tenure upon being recalled from layoff due to declining enrollment. Whether this also covers the case of dismissal for budgetary reasons is on remand to a trial court.[165]

A tenure issue arose in New York, where a tenure hearing panel had rejected a board's charges against a teacher pursuant to his dismissal. On appeal to the state commissioner of education that recommendation was annulled because the panel's chairperson had failed to disclose that he had represented the teacher in his capacity as general counsel for the New York State United Teachers and was in their employ as a permanent arbitrator for their internal disputes with employees. The court upheld the annullment and the reconvening of the panel with a new chairperson.[166]

3.6g General

Several cases centerd on disagreements between employers and employees over the meaning of words in agreements and statutes. An Ohio court found that reducing the hours of certain employees as an economy measure was not forbidden by a statute prohibiting salary reductions except where part of a uniform plan. The court defined the statutory term "salary" as (1) not excluding employees paid hourly wages, and (2) a rate of pay per hour rather than a total amount received from working any number of hours. The court reviewed the standards to be used in ascertaining the applicability of terms in statutes to unusual situations as follows (in descending order of persuasiveness):

(1) an explicit statutory definition of the word
(2) ascertaining that an adherence to the plain and ordinary meaning of the word would defeat the legislative purpose
(3) legislative intention . . . and *to the purpose to be accomplished*
(4) to give effect to the *words used* [in a statute], not to delete words *or to insert words not used*[167]

---

165. Ripley v. School Comm. of Norwood, 451 N.E.2d 721 (Mass. 1983); School Comm. of Grafton v. Grafton Teachers' Ass'n, 452 N.E.2d 495 (Mass. 1983).
166. Conley v. Ambach, 461 N.Y.S.wd 929 (N.Y. App. Div 1983).
167. Ohio Ass'n of Pub. School Employees, Chapter 672 v. Twin Valley Local School Dist. Bd. of Educ., 451 N.E.2d 1211, 1214 (Ohio 1983).

In Michigan, the meaning of the phrase "financial resources" in the agreement's provisions for declaring fiscal emergency and allowing certain layoff provisions to go into effect was found not, as the district claimed, to be limited to the budget surplus. The district had attempted to declare such an emergency and initiate layoffs when its surplus was more than consumed by a projected budget deficit. The court held that the phrase "means the funds—assets, expected revenues, etc. available for expenditure," and found that, under this definition, "[t]he record shows that there was no reduction in financial resources."[168] In Connecticut, a contractual phrase regarding boards' right to discipline employees "short of termination" was found to encompass a three-year suspension without pay for insubordination. The reviewing court found the action not excessive and clearly an action short of full termination.[169]

In three cases, terms of local agreements were pitted against state statutes. In Ohio, the statutory definition of the phrase "years of service" as meaning all service in any school district in the state was redefined in an agreement to provide that a maximum of five years of outside experience would be allowed for longevity purposes. The court found a companion law that permitted local boards to redefine allowable years of experience within limits and ruled that, by the latter, the board was given discretion to bargain for the changes under challenge.[170]

In Massachusetts, the association sought to compel the school committee to cease requiring more than twenty hours of employment per week to qualify for health insurance coverage, citing a statute that required employers to provide such insurance for all employees employed by the school committee for "no less than twenty hours per week." The committee argued that the statutory provision was directory, stating only a minimum from which it was free to expand. The court disagreed and would not, as the committee sought, bar under laches and voluntary waiver the possibility of recovery of damages for over seven years of violation. It left that determination to a trial court.[171]

In Oklahoma, a contract provided for five days of leave, two of which were to be without salary loss to the teacher and three of which were, pursuant to statute, to be reduced only by the amount that a

168. Port Huron Area School Dist. v. Port Huron Educ. Ass'n, 337 N.W.2d 413, 415 (Mich. Ct. App. 1983).

169. Tucker v. Board of Educ., Town of Norfolk, 462 A.2d 385 (Conn. 1983).

170. Maple Heights Teachers' Ass'n v. Maple Heights Bd. of Educ., 453 N.E.2d 619 (Ohio Ct. App. 1983).

171. Lexington Educ. Ass'n v. Town of Lexington, 448 N.E.2d 1271 (Mass. App. Ct. 1983).

substitute received. In this case, the collective bargaining agreement explicitly gave the administration the prerogative to decide whether a substitute was required during any teacher absence, and the issue arose when the board did not hire a substitute but nevertheless reduced the teacher's pay an amount equivalent to the cost of one. The court found the district's action to be permitted by the agreement and the provisions of the statute, which were found to be a statement of limitation on reduction of a teacher's salary rather than a mandate either to hire a substitute or pay the teacher full salary for the days absent.[172]

In Louisiana the education association attempted to force the school board to allocate 83.8 percent of the proceeds newly derived from sales tax revenues via a special election. The teachers claimed that by including in its campaign for passage of the allocation the statement that 83.8 percent of the district's budget was spent on salaries, the board thereby committed itself to using the money exactly in that amount. The court disagreed, finding that the board did not abuse its authority in allocating the new revenues differently.[173] In California, where a court found that employees who worked on four-day-per-week shifts were entitled to time and one-half benefits for holiday work, the court discussed how statutes and agreements should be accommodated: "legislative intent underlying a statute is to be ascertained by reading it in such a manner as will give effect to the ordinary impact of its language."[174]

A court-ordered desegregation plan in Chicago was alleged to violate the collective bargaining agreement and the union sued for breach of contract in the federal courts. The district court found that the desegregation order did not give the matter federal jurisdiction and that the Labor-Management Relations Act does not apply to school districts. In sum, the court found no federal remedy for alleged breach of a collective bargaining agreement in the public sector.[175]

3.7 JUDICIAL REVIEW OF AWARDS

Judicial review of administrative proceedings under collective bargaining legislation is inherently circumscribed. Not only do the doctrines of res judica and stare decisis result in stability of decisions and awards under review, but also the courts' perception that arbitration

172. Earnest v. School Bd. of Indep. Dist. No. 16, 666 P.2d 1287 (Okla. 1983).
173. Louisiana Ass'n of Educators v. St. Tammany Parish School Bd., 430 So. 2d 1144 (La. Ct. App. 1983).
174. California, *supra* note 126, at 467.
175. Chicago Teachers' Union v. Board of Educ., Chicago, 569 F. Supp. 597 (D. Ill. 1983).

has been established as an *alternative to*, rather than a *preclude to*, court proceedings resists reversals. Michigan and New York courts described the matter thus:

> It . . . provides a simpler, less costly form of resolving disputes and avoids protracted litigation [Michigan].
>
> Judicial review of arbitration awards is . . . circumscribed, lest the arbitrator's determination become the commencement instead of the end of litigation [New York].[176]

Consequently, all challenges either to lower court decisions or to arbitration awards face a strong presumption of validity; they need only be reasonable and based on substantial evidence.[177] According to a Wisconsin court, this standard "does not permit a court to overturn an agency's finding even if it may be against the great weight and clear preponderance of the evidence."[178] A Pennsylvania court referred to a "broad deference," defining it as meaning that "[s]o long as the subject matter of the dispute is encompassed within the agreement, the validity of the arbitrator's interpretation is not a proper subject for review; [this] applies equally to his determinations regarding the arbitrability of the subject matter of the grievance."[179]

When, as in Idaho, a court is asked to review the decisions of the school board directly (no arbitration having occurred), the standard is even greater, since the actions of elective bodies will be deferred to "unless corrupt, arbitrary, or unreasonable."[180]

3.7a Standard of Review

The standards that are used to review challenged awards are somewhat obscured because the highly vested interest that parties have in the outcome of their disputes leads losing sides to press forward for review simply because they feel strongly about the perceived injustice of the award. This, for the most part, risks their appearing to challenge the substantive content of the award, an approach that is rarely successful. Virtually all jurisdictions follow the practice reflected by a New York court's comment that "[a]s a matter of public policy, the merits of an arbitration are beyond judicial review."[181] Another court

---

176. Northern Michigan Educ. Ass'n v. Board of Educ., Cheboygan Area Schools, 337 N.W.2d 923, 926 (Mich. Ct. App. 1983); Dover, *supra* note 131, at 272.

177. Lincoln, *supra* note 26; North Smithfield, *supra* note 139.

178. Madison Teachers, Inc. v. Wisconsin Employment Rels. Comm'n, 340 N.W.2d 571, 573 (Wis. Ct. App. 1983).

179. Bristol Twp. Educ. Ass'n v. Bristol Twp. School Dist., 460 A.2d 387, 388 (Pa. Commw. Ct. 1983).

180. Gilbert, *supra* note 60, at 5.

181. Dover, *supra* note 131, at 272.

in the same state affirmed that "[t]he mere fact that a different construction could have been accorded the provisions concerned and a different conclusion reached does not mean that the arbitrators so misread the provisions as to empower a court to set aside the award."[182]

To test whether the challenge improperly goes to the merits, courts uniformly use standardized positive and negative descriptors. Examples of the former are that decisions will be "given great weight" if they are based on "competent, material, and substantial" or "a preponderance of the competent" evidence.[183] In negative terms, qualities such as the following are sought: "not palpably erroneous," "not arbitrary, capricious, or illegal," "[not] an error of law [or] an abuse of discretion," "[does] not alter, add to, or detract from the provisions of the agreement," "[has no] undisclosed bias or conflict of interest," and "[not] completely irrational."[184] Taken together, these positive and negative qualities become the oft-used standard that states generally that if the award is drawn from the "essence of" or is "encompassed by" the agreement in "any substantial way," it will be upheld even where the possibility of error exists.[185]

A Pennsylvania court clearly articulated the breadth of the zone of acceptability when it noted that an award will be upheld whenever it "can in any rational way be derived from the Agreement, in light of its language, its context, and any other indications of the parties' intent."[186] Courts as far apart geographically as New York and Hawaii sounded a similar note: "[c]ourts may not overturn an award because they believe the arbitrator has misconstrued the apparent, or even the obvious meaning of the contract," and "[t]he arbitrator's decision will ... be upheld unless there is fraud, corruption, procedural misbehavior or where the arbitrator exceeded his powers."[187]

Appellate court review of lower court cases is similarly circumscribed. A California court, in refusing to retry a school board's decision after a trial court had reversed it, said that "[t]he appellate court will only reverse the judgment of the superior [trial] court if it is based on an

---

182. Long Island Univ. Faculty Fed'n, Local 3998 N.Y.S.U.T., AFT, AFL-CIO v. Board of Trustees, Long Island Univ., 457 N.Y.S.2d 325, 327 (N.Y. App. Div. 1983).

183. State v. New York State Pub. Employment Rels. Bd., 457 N.Y.S.2d 649, 651 (N.Y. App. Div. 1982); Michigan, *supra* note 32; Rankin v. Board of Educ., Marshalltown Commun. School Dist., 337 N.W.2d 886, 890 (Iowa Ct. App. 1983).

184. Aio, *supra* note 11; Richland, *supra* note 40; Newman, *supra* note 47; Dover, *supra* note 131; Ripley, *supra* note 165; Grafton, *supra* note 165.

185. Newman, *supra* note 47; South Bend, *supra* note 78; Lincoln, *supra* note 26; North Smithfield, *supra* note 139; Central Susquehanna Intermediate Unit Educ. Ass'n v. Central Susquehanna Intermediate Unit No. 16, 459 A.2d 889 (Pa. Commw. Ct. 1983).

186. Pittston, *supra* note 137, at 1149.

187. Long Island, *supra* note 182; University of Hawaii Professional Assembly v. University of Hawaii, 659 P.2d 717, 719 (Hawaii 1983).

erroneous conclusion of law."[188] A Michigan appellate court articulated the standard in finding that lower court resolution of disputes "may not be set aside absent mistake, fraud, or unconscionable conduct."[189] When, however, the lower court's decision is found to be faulty at law or violative of public policy, it will be reversed or modified on appeal. In Montana a trial court's decision was reversed because it had entertained inadmissible *parol* evidence in finding that the teachers had waived their rights to certain retirement benefits.[190] In New York, where the appellate court could find no disputed issue of fact requiring a trail, it found the lower court in error for ordering one; but another court in that state found itself foreclosed from review when the record showed that sufficient evidence supported the trial court's award of back pay in a case that was based on the board's having denied appeals due a teacher who was involuntarily retired.[191] According to a Missouri court, trial court decisions are subject to a broadened standard of review if the initial decision was a noncontested adjudication rather than contested:

> There is no supersedence by constitution or rule or statute [as in the case of judicial review of a contested case] to the operation of Rule 73.01 to the appellate review of a circuit court judgment in a noncontested case, and every logic commends it. Accordingly, *the court of appeals reviews the judgement of the circuit court* to determine whether the adjudication that the administrative decision was or was not "unconstitutional, unlawful, unreasonable, arbitrary or capricious, or involves an abuse of discretion," rests on substantial evidence and validly decides the questions of law. In that exercise the court of appeals—unlike the review of a contested case—may weigh the evidence before the circuit court when the record engenders a firm belief that the judgement is wrong.[192]

Somewhat broader standards of review are used when commission or PERB decisions are appealed. This derives from the capability of such tribunals, themselves, to substitute their judgment for that of the arbitrator and establish their own rules regarding conduct of hearings, including standards for reopening or not reopening their final orders.[193] This principle has definite limits, however, which become

188. Alba v. Los Angeles Unified School Dist., 189 Cal. Rtpr. 897, 902 (Cal. Ct. App. 1983).
189. Northern Michigan, *supra* note 176, at 926.
190. Butte Teachers, *supra* note 54.
191. Abrams, *supra* note 55; Marland v. Ambach, 463 N.Y.S.2d 422 (N.Y. 1983).
192. Phipps, *supra* note 122, at 97.
193. Ripley, *supra* note 165; Gratton, *supra* note 165; School Comm. of New Bedford v. Labor Rels. Comm'n, 444 N.E.2d 963 (Mass. App. Ct. 1983).

most clear, as explained in New Jersey: "where the issue is one of law, the Commissioner's and the State Board's decisions do not carry a presumption of validity and it is for this court to decide whether those decisions are in accord with the law."[194]

3.7b Propriety of Awards

Breadth of presumption regarding the validity of awards notwithstanding, it is not unusual for them to be found outside the bounds of acceptability established by law. A court in Wisconsin, in finding an arbitrator's restoration of a dismissed teacher arbitrary and capricious, drew upon previous case law to define these two "tandem concepts":

> [arbitrary] . . . such action is unreasonable or does not have a rational basis . . . the result of an unconsidered, wilful and irrational choice of conduct and not the result of the "winnowing and sifting" process;
>
> [capricious] . . . the most flagrant violations of the scope of delegated discretionary powers . . . whimsical, unreasoning departure from established norms or standards . . . action which is mercurial, unstable, inconstant or fickle . . . so unreasonable as to "shock the sense of justice and indicate lack of fair and careful consideration."[195]

The arbitrator's action that the court found to fit the above description was his conclusion, based solely on the written record and no personal contact, that witnesses for the administration who had appeared at the board's hearing on the matter were not credible, consequently restoring a discharged teacher to her position.

Most faulty awards do not occasion such dramatic language, even though phrases such as "abuse of discretion," "exceeded his authority," and "contrary to law" differ from "arbitrary and capricious" more in form than in substance. In Illinois, an arbitrator was found to have no authority to hear the grievance of substitute teachers who were not members of the bargaining unit. Nonparties to the agreement, according to the court, cannot utilize its provisions.[196] An award of interest on back pay was reversed in Pennsylvania because it had not been requested in the original grievance.[197] Also in Pennsylvania, an award was reversed because the arbitrator exceeded his authority in

194. Parsippany, *supra* note 148, at 18.
195. Nicolet High School Dist. v. Nicolet Educ. Ass'n, 337 N.W.2d 846, 848 (Wis. Ct. App. 1983).
196. Meridian, *supra* note 34.
197. Pennsylvania State Educ. Ass'n v. Appalachia Intermediate Unit No. 8, 460 A.2d 1234 (Pa. Commw. Ct. 1983).

ordering perfect scores posted for everybody as a remedy for improper administration of standardized tests. Retesting was found to be the only proper remedy.[198]

In Hawaii, arbitration awards were reversed where they were found to be contrary to the faculty handbook and state law. In the latter case, the arbitrator had ordered a special tenure review panel convened to hear claims of nonpromoted employees that they had been treated improperly.[199] An award of punitive damages was reversed in the state of Washington because the statutes were found not to authorize them,[200] and an award in New York that was ambiguous as to whether it was advisory or binding and that failed to dispose of some of the parties' petitions for relief was vacated and remanded.[201]

The range of awards that courts have found to be proper has already been established in previous sections. Examples that are more representative than exhaustive of what has been found to be acceptable include approval of an arbitrator's finding that a university had failed to follow its own procedures in denying promotion of faculty, reinstating and granting back pay to a discharged employee, determining whether certain employees were members of the bargaining unit, and permitting teachers to conduct association business within the workday.[202] Three cases not previously discussed upheld the following awards: one granted additional compensation for overtime work that became necessary when the board changed working hours; another classified, for pay purposes, replacement teachers who performed full-time service as regular rather than as substitute teachers; and the third used terms of the agreement to calculate disputed seniority placements.[203]

3.8 IMPASSE AND DISPUTE RESOLUTION

3.8a Factfinding and Arbitration

Resolution of impasse by means other than exercise of power, whether through the employees' organized efforts, the employers' economic

198. Perkiomen Valley Educ. Ass'n v. Perkiomen Valley School Dist., 460 A.2d 896 (Pa. Commw. Ct. 1983).

199. University of Hawaii v. University of Hawaii Professional Assembly, Watanabe, 659 P.2d 732 (Hawaii 1983); University of Hawaii v. University of Hawaii Professional Assembly, Wiederholt, 659 P.2d 729 (Hawaii 1983).

200. Kennewick Educ. Ass'n v. Kennewick School Dist., 666 P.2d 928 (Wash. Ct. App. 1983).

201. Farmingdale, *supra* note 106.

202. University of Hawaii (Daeufer), *supra* note 29; Cape Elizabeth, *supra* note 30; Leapley, *supra* note 35; Graham, *supra* note 90.

203. Danville Educ. Ass'n v. Danville Area School Dist., 467 A.2d 644 (Pa. Commw. Ct. 1983); Willamina School Dist. 30J v. Willamina Educ. Ass'n, 655 P.2d 189 (Or. Ct. App. 1982); Stein v. Philadelphia Fed'n of Teachers, Local 3, AFT, AFL-CIO, 464 A.2d 606 (Pa. Commw. Ct. 1983).

and security sanctions, or an arbitrator's binding award, does not frequently appear in litigation. This is not to say, however, that prelitigation means are not widely used. In Wisconsin, for instance, fully eighty percent of the impasse conditions initially reported to the Employment Relations Commission are resolved by the parties prior to certification, and, of the twenty percent remaining, about half are settled through mediation.[204] Decisions mentioning or recommending advisory arbitration (*see* notes 106 and 107) represent the nearest approximation to nonadversarial disposition that was reported during 1983.

3.8b Rights on Expiration of Contracts

Questions regarding employees' rights upon expiration of their contracts when negotiations are continuing, however, do generate litigation. They almost always arise from a board taking one of three unilateral actions in order, ostensibly, to "encourage" the employees to settle: (1) terminating payments for certain fringe benefits, especially health insurance; (2) refusing to grant increments of the expired agreement's salary schedule; and (3) unilaterally implementing the terms of its last best offer. Employees' organizations object to all of these, the first two primarily because they have a direct impact on take-home pay, and the third because it erodes the fundamental principles of bargaining.

During 1983, examples of the latter two were reported. In Delaware, the United States District Court found that "if a right to step increases exists, it can be enforced in the Delaware courts."[205] In Pennsylvania, as well, the district's failure to "step up" teachers on the salary schedule after the agreement expired was found not justiciable, inasmuch as it was, if anything, an unfair labor practice, redress of which was required to be sought before a labor relations board.[206] In Indiana, by contrast, withholding step increases was found to be precluded by a statute that required maintenance of the "status quo" at impasse. The court defined the term as *all* aspects of the previous agreement, including the step increases on the old schedule, which was moved forward during the period of impasse.[207] A California district that attempted to implement its last best offer at impasse was found to be engaging in an unfair labor practice. The court reasoned the action

204. Milwaukee Sentinel, March 12, 1984, pt. 1, at 17.
205. New Castle, *supra* note 23, at 1486.
206. Bailey, *supra* note 115.
207. Indiana Educ. Employment Rels. Bd. v. Mill Creek Classroom Teachers' Ass'n, 456 N.E.2d 709 (Ind. 1983).

was, though short of refusal to bargain in good faith, "destabilizing and disorienting," and, if permitted, would give the board a "one sided edge" that would surely delay, and even may totally frustrate, the process of arriving at a contract."[208]

3.9 CONCERTED ACTIVITY

3.9a Strikes

Strikes rarely occurred during 1983, but litigation carrying over from previous years' strikes was settled in a number of jurisdictions. Typically, courts are sympathetic to boards' petitions for injunctions against strikes where they are not permitted by law (there is no common-law right to strike in the public sector). In Pennsylvania, a court's issuance of a back-to-work order was found justified because the loss of instructional time to students constituted a "clear and present danger to the public welfare." The district's attempt to escape compliance with an accompanying order to continue bargaining was thwarted by the court's refusal to transfer that part of the dispute to the labor relations board as an unfair labor practice.[209]

In Ohio, striking teachers found they were not entitled to separate trials for violating a no-strike court order, and their claim that listing remedies for work stoppages in the PERA precluded the issuance of injunctions was rejected. However, the court ruled that their defiance of a court order amounted to criminal contempt necessitating proof of guilt "beyond reasonable doubt" prior to punishment rather than the lesser "clear and convincing" standard that the trial court had used. The appellate court reviewed the purpose of penalties for such contempt as follows: "the fine cannot coerce compliance, nor is it remedial, but rather is a punishment for completed acts of disobedience. Its purpose is to vindicate the authority of the court and the law."[210]

Damages arising from strikes were sought in two cases. In California, the PERB, not the courts, was found to have jurisdiction to hear a district's claims against striking unions for engaging in an illegal strike.[211] In New York, a union local kept off the job by a wildcat strike of other unions attempted to recover its members' lost wages from the

208. Moreno Valley, *supra* note 66, at 66.
209. California Area School Dist. v. Pennsylvania State Employees' Ass'n, No. 8006 (Pa. Ct. C.P. 1983); Decker, *supra* note 17, at 39,551.
210. Board of Educ., Hamilton City School Dist. v. Hamilton Classroom Teachers' Ass'n, 449 N.E.2d 26, 31 (Ohio Ct. App. 1982).
211. El Rancho Unified School Dist. v. National Educ. Ass'n, 192 Cal. Rptr. 123 (Cal. 1983).

offending union. The court could find no evidence that the plaintiff attempted to perform its work during the strike; consequently the board's withholding of the contract payments was upheld.[212] Teachers in two districts in Pennsylvania tried to obtain unemployment compensation for a period during which they engaged in a work stoppage. Finding no evidence that their absence from the job was a lockout, as they claimed, the court disallowed their petition as well as finding that the district's failure to "step up" the salary schedule was *not* a disturbance of the status quo.[213]

3.9b Enforcement Actions

Overt district response to work stoppage during 1983 was typically limited to withholding pay for days lost. In Michigan the action was successful even where the reduction came indirectly, due to the board's changing the length of the school year to accommodate the lost days after the strike was settled.[214] In Illinois and Pennsylvania, allegations that boards had unlawfully reduced salaries from contractual amounts were held to be charges of unfair labor practice, therefore requiring arbitration and PERB review prior to litigation.[215]

Allegations of refusing to hire as reprisal for a teachers' strike were made in Oregon and Illinois. In the former state, attorney's fees were not awarded even though the charge of retaliatory hiring of noncertified employees was successful. In the latter, substitute teachers, though not union members, had refused to cross picket lines during a teacher strike. When they found themselves not called for service subsequently they sought the assistance of the union. As nonparties to the agreement, they were found not to be protected by its terms, including grievance filing and arbitration.[216]

Two issues were settled regarding statutory delimiters for strike-imposed changes in compensation. For bus drivers laid off due to a teacher strike, their one-week waiting period for unemployment compensation began the day they were laid off, not the immediately following Sunday as the Commissioner of Economic Security had interpreted the statutory meaning of a "one week" delay.[217] For teachers

212. Parochial Bus Systems, Inc.v. Board of Educ., City of New York, 457 N.Y.S.2d 285 (N.Y. App. Div. 1983).

213. Fairview School Dist. v. Commonwealth Unemployment Compensation Bd., 454 A.2d 517 (Pa. 1982) (also disposed of a number of additional cases arising from the same dispute); Union City School Dist. v. Commonwealth Unemployment Compensation Bd., 454 A.2d 517, 522 (Pa. 1982).

214. Ash, *supra* note 23.

215. East Pennsboro, *supra* note 105; Arbor Park, *supra* note 111; Bailey, *supra* note 115.

216. Oregon Educ. Ass'n v. Eugene School Dist. No. 4J, 666 P.2d 272 (Or. Ct. App. 1983); Meridian, *supra* note 34.

217. Mortel v. Independent School Dist. No. 831, Forest Lake Pub. Schools, 334 N.W.2d 408 (Minn. 1983).

who were penalized salaries for a work stoppage, calculation of a ninety-day limit for deduction of penalties began on the date of the issuance of the check, not its arrival. Hence, though they received their reduced checks after the ninety-day limit, the deductions were still valid.[218]

It would be as risky as it is tempting to overgeneralize the courts' lack of sympathy for teachers' various job actions during impasse. A California court suggested that the common-law prohibition against public sector strikes, absent expressed statutory provision for them, is at least subject to reexamination under labor relations legislation. In a long-standing, and not yet consummated, dispute over the proper remedy for an unauthorized strike, the court observed that an otherwise illegal strike mignt be justified under the law, given a sufficiently egregious employer labor practice:

> While conceding that EERA does not provide express protection for economic strikes, the Unions reason that strikes undertaken in response to unfair practices on the part of a public school employer—i.e., unfair labor practice strikes—may be ruled protected. That idea may seem anomalous. In fact, it is not. The proposition finds substantial support in ths court's decision in *San Diego Teachers* which recognized that "EERA gives PERB discretion to withhold as well as to pursue" a remedy and that the overriding consideration is whether imposition of a remedy will effectuate the purposes of the act. (593 P.2d 838) The proposition also finds support in a decision of the Michigan Supreme Court interpreting that state's Public Employment Relations Act. Although Michigan's PERA expressedly declares public employee strikes to be illegal the Michigan Supreme Court held, in *Lamphere School v. Lamphere Fed'n of Teachers*, (Mich. 1977) 252 N.W.2d 818, 824 that a public employer's conduct may convert an unlawful economic strike into a protected unfair labor practice strike ... against which no remedy should be imposed.[219]

A concurring opinion, while supporting the decision's central theme that the PERB's jurisdiction preempted a trial court from adjucating a claim in torts for damages arising from a strike, argued that "public employee strikes are illegal in this state. ... This court should no longer continue its hesitant, tentative ritual dance around the perimeter of this central legal principle, but honestly, openly, and forthrightly enforce it."[220]

---

218. Swital v. Board of Educ., Bay Shore Union Free School Dist., 461 N.Y.S.2d 82 (N.Y. App. Div. 1983).
219. El Rancho, *supra* note 211, at 130.
220. *Id.* at 133.

3.10 MISCELLANEOUS DECISIONS

Anything as complex as employer-employee interaction confined within the four walls of a written agreement (and related laws) is inevitably bound to test the limits of its confinement by generating unanticipated incidents that must be resolved. Some of the more puzzling moments occured when the question arises as to what controls the disposition of a dispute when either or both of the following exists: (1) the agreement expires, or (2) the affected member has left employment and is no longer party to the agreement. A New York court resolved it as follows:

> As a matter of law, disputes covered by a collective bargaining agreement are to be resolved pursuant to the provisions of such agreement even if its term has expired or the union member has left his employment; such rights as he may have are derived from the very agreement that entrusts their enforcement to the union.[221]

Suppose, for another puzzle, a national union suspends a local for being in arrears in its dues to the parent body. Two years later, the local formally disaffiliates. Was, as the union constitution seemed to indicate, the local liable for the dues not paid during the time of the suspension up until the time of its disaffiliation? Or, as the local argued, did their suspended status mean that they received no services and, hence, owed no dues? A New York court, though conceding that the constitution and bylaws were ambiguous, found that the dues were owed, inasmuch as the charter indicated that suspension was a penalty short of disaffiliation for failure to pay dues, and all benefits remained intact save participation in the annual convention. Further proceedings to fix the amount of back dues owed were ordered.[222]

Questions arose when *parents* picketed the schools in protest against board action in closing a building, and the board closed the schools for fear of violence. Do the teachers get paid for the days under a statute providing that when a school is closed "by proper authorities" due to "calamitous cause" teachers should suffer no loss? Or, as the district claimed, was there insufficient evidence that the picketing protended "calamity," and was the local principal who ordered the closures a "proper authority" merely by virtue of having received the permission of the county superintendent of schools to do so? The court answered both in the affirmative, finding, especially, that concern for the safety of the children and the teachers was an administrative judgment that should not be reviewed by a court. The employees' pay was restored.[223]

---

221. Abrams, *supra* note 55, at 800.
222. Shanker v. Isenberg, 464 N.Y.S.2d 863 (N.Y. App. Div. 1983).
223. Dillon v. Mingo City Bd. of Educ., No. 15548 (W. Va. 1983); Decker, *supra* note 17, at 39,323.

Does a law providing that certificated employees absent due to illness for a period of five months or less shall receive pay equal to the difference between their salaries and that of the substitutes hired to replace them contemplate the entitlement only once or does it create a separate entitlement for each school year? The problem arose when a teacher in California, who was out for nearly two years due to work-related injury, claimed the salary and other benefits for the entire period and the district refused to pay after the end of the first year. The court found that the statute created new entitlements every year and awarded the pay and other benefits restored.[224]

In Oregon, an interesting "what if?" occurred when a typographical error caused a negotiated agreement of a one percent salary increase for hourly employees to be printed as ten percent. The district sought formal reformation of the agreement, but the association refused. The district then sought judicial review, which was denied as being out of the court's jurisdiction. Although the district was successful in maintaining the salary at the one percent level, the appellate court's decision took note that a school district "cannot invoke circuit court jurisdiction merely by characterizing its action as reformation of a contract .... Collective bargaining agreements are not 'ordinary contracts' and are not 'governed by the same old common law concepts which control such private contracts' but are 'unique in character and a field unto themselves.' "[225]

In a lengthy decision a California court systematically reviewed and disposed of over seventeen causes for action rising out of newspaper reports of a defeated incumbent board member's actions during a teachers' strike and two election campaigns. One of the plaintiff's claims was that innuendoes were made charging her with being on the teachers' side and with appearing at teachers' union rallies and that these were defamatory. The court agreed that the making of such statements did present triable issues of fact and ordered the trial court to reverse its previous summary dismissal of this portion of the claims. The appellate court refused, however, to give much consideration to the plaintiff's claim for damages due to failure to win the election. It found and cited several precedent decisions which had uniformly and unsympathetically refused to permit losing candidates to recover, in defamation action, the damages represented by lost future earnings and benefits of office. The various rationale included the following:

---

224. California Teachers' Ass'n v. Governing Bd. of Gustine, 163 Cal. Rptr. 650 (Cal. Ct. App. 1983).
225. School Dist. 115, *supra* note 113, at 823.

> Lost future financial perquisites of office [are] ... too uncertain and speculative because a thousand factors might influence an election .... Looking into the cause of election defeats [would be] akin to opening Pandora's box .... It is common knowledge that there are many surprises as the result of elections by the people .... The evidence here does not show any possibility [plaintiff] can establish she would have won reelection except for those statements we deemed potentially libelous.[226]

Finally, a district in Iowa had agreed in its collective bargaining agreement to consider multiple factors—teaching experience, relative skill and ability, teaching experience in other schools, breadth and depth of certification, and subject and grade level expertise—prior to selecting any teacher for layoff was required by a court to abide by the agreement. It had laid off a teacher solely on the basis of his experience in the district, leading the court to decide that, although it could foresee situations in which the board need not consider all the factors, in this case it should have inquired, at least, into his relative skill and ability. The teacher was reinstated.[227]

3.11 CONCLUSION

During 1983 the courts sent a clear and consistent message about litigating collective bargaining disputes: Do not bring them to the bar; administrative proceedings have been established to resolve them and there is little inclination to change the decisions reached thereby. Even the exceptions, where courts reverse the decisions of arbitrators and PERBs, seem to deliver the same message by invariably containing extended, sometimes almost apologetic, rationales justifying the rare departure from the general thrust of the law. Of course this is not news to anyone except, perhaps, erstwhile litigants who perceive the courts as having been invented primarily to redress their particular private complaints, much like a knight in shining armor always waiting to happen along just in time to rescue a damsel in distress.

The 1983 decisions reveal no such trend. They reveal that the courts are committed neither to protect nor to beleaguer either employer or employee rights or benefits. Instead, they reveal a commitment to examining the law, whether it be found in constitutions, statutes, or terms of agreements, and enforcing it even to the discomfort of litigants. Essentially the court are stating, sometimes explicitly, that if the requirements are troubling, they should be changed; meanwhile

---

226. Fisher v. Larsen, 188 Cal. Rptr. 216, 223 (Cal. Ct. App. 1982).
227. Sac City Bd. of Educ. v. Schermerhorn, 340 N.W.2d 789 (Iowa Ct. App. 1983).

they should be followed. This is the best lesson to be gleaned from the 1983 decisions. Read and follow the law and the terms of local agreements. The courts made neither of them, have little disposition to do so, and will not accept any of the blame for the awkward outcomes of either. Thereby, it is difficult to recruit the courts as rescue squads to redeem either employers or employees from bargains struck in moments of indiscretion.